TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM [redacted] 1926

No. [redacted] 45

HARTFORD ACCIDENT AND INDEMNITY COMPANY OF HARTFORD, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED FEBRUARY 21, 1925

(30,887)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1925

[fol. a] [Caption omitted]

[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS**

Consolidated Causes No. A. D. 1123

In the Matter of the Petition of NATIONAL OIL TRANSPORT COMPANY, as Owner of the "Bolikow," etc., for Limitation of Liability

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Jany. 17, 1924

It is hereby stipulated and agreed by and between Proctors of the claimants-respondents, Southern Pacific Company, and Proctors for the surety on petitioner's bond, The Hartford Accident & Indemnity Company, that the following papers, and no others, shall constitute the record on appeal to be taken by the surety above named:

1. Petition for Limitation of Liability, filed October 10, 1921.

2. Claim of Southern Pacific Company, filed with the Commissioner December 30th, 1921, and in Court January 9th, 1922 omitting from said claim, however, Statement and Bill of Particulars and Exhibits.

[fol. 2] 3. Answer of Southern Pacific Company, filed December 30th, 1922.

4. Amendments to Answer of Southern Pacific Company, filed January 23rd, 1922.

5. Original Affidavit of R. J. Barry, filed October 14th, 1921.

6. Original Affidavit of W. Hyland, filed October 14th, 1921.

7. Ad Interim Stipulation for Value, filed October 14th, 1921.

8. Order for Proof of Claim, Issuance of Monition and Injunction, filed October 14th, 1921.

9. Monition issued October 14th, 1921.

10. Notice with Marshal's Return, filed November 17th, 1921.

11. Decree denying Limitation of Liability and making reference to Commissioner to ascertain damages, filed March 20th, 1923.

12. Motion of Claimants-Respondents, Southern Pacific Company for the entrance of Final Decree, filed the — day of ——, 1923.

13. Petition for Dismissal by surety on Limitation of Liability Bond, The Hartford Accident & Indemnity Company, and objections to entrance of Decree against it; filed August 18th, 1923.

[fol. 3] 14. Opinion of the District Judge.

15. Final Decree, filed December 17th, 1923.

It is agreed that claims largely in excess of the amount of the bond were proven in the above proceeding and that no appeal has been taken from the Decree denying Limitation of Liability.

It is further stipulated and agreed that the foregoing stipulation shall be inserted in the Record and be a præcipe to complete the same.

Terry, Cavin & Mills, W. T. Armstrong, W. E. Cranford, Proctors for Claimants-Respondents, Southern Pacific Company. Williams & Neethe, Proctors for Stipulator on Limitation Bond. R. H. Kelly, by J. N., Proctor for National Oil Transport Co. and Its Trustee in Bankruptcy.

[File endorsement omitted.]

[fol. 4] IN UNITED STATES DISTRICT COURT

[Caption omitted]

ORIGINAL PETITION FOR LIMITATION OF LIABILITY—Filed Oct. 19, 1921

To the Honorable the Judges of the United States District Court for the Southern District of Texas:

The Libel and Petition of the National Oil Transport Company, as Owner of the Wooden Oil Tank Barge "Bolikow," her tackle, apparel, and pending freight, etc., in a cause of limitation of liability, [fol. 5] civil and maritime, alleges on information and belief and respectfully shows to this Honorable Court, as follows:

First. That at and during all the time hereinafter mentioned, the libelant and petitioner was and now is a foreign corporation created, organized and existing under and by virtue of the laws of the State of Maine, with an office and place of business in the City of Galveston, in the State of Texas, and was, at all said times, the sole owner of the wooden oil tank barge "Bolikow."

Second. That on or about the 23rd day of December, 1920, the said wooden oil tank barge "Bolikow" was made fast to and breasted off from the westerly side of Pier A of the Southern Pacific Docks at said City of Galveston in the Southern District of Texas, and was laden with a cargo of crude oil from which a large part thereof had been discharged. At said time the said barge "Bolikow" was in the custody of the United States Marshal for the Southern District of Texas, and upon taking possession of said barge, the said United States Marshal had stopped the discharge of said cargo. The barge "Bolikow" was not a self-propelled vessel, but had a boiler for the operating of her pumps and other auxiliaries used in discharging cargoes of crude oil and in accordance with custom, had necessarily been heating said crude oil in order to increase the fluidity thereof

to enable said cargo to be discharged in the usual and customary manner as aforesaid. At about 1:50 P. M., on the 23rd day of December, 1920, and at a time when the said barge was in the custody of the United States Marshal and at a time when no oil was being discharged from said vessel, an explosion occurred in tank No. 2 of said barge when said tank, which had a capacity of about [fol. 6] three thousand (3000) barrels of oil, was about two-thirds full. The said barge and her cargo took fire immediately and burned fiercely alongside of Pier A.

Before the said fire had spread to the apron of Pier A, the tug "Barwick" came into the slip and made lines fast to the "Bolikow", and began to pull her out of the slip. The "Barwick" had gotten under way and was pulling the "Bolikow" out of the slip when the "El Occidente" came across the slip and jammed her starboard quarter against the starboard side of the "Bolikow", thus forcing the "Bolikow" against the apron of Pier A and causing the lines between the "Bolikow" and the "Barwick" to part. It then became impossible to tow the "Bolikow" out of the slip without first removing the "El Occidente" and the "Barwick" proceeded at once to pull the "El Occidente" out of the way, and after placing the latter in a place of safety, and before the "Barwick" could return to the "Bolikow" the fire had spread completely over the "Bolikow," and it was impossible to make other lines fast.

Third. That the value of said barge "Bolikow," her tackle, apparel, etc., at the termination of said fire was Two Hundred and fifty ($250.00) Dollars, and that her pending freight at the time, did not exceed the sum of Eleven Thousand seventy-six and 85/100 ($11,076.85) Dollars.

Fourth. That after the said explosion took place in the barge "Bolikow" and the fire on board thereof had commenced, the fire spread to adjoining property causing some damage thereto; that some members of the crew of said barge sustained personal injuries by reason of said explosion and two members of the crew disappeared [fol. 7] entirely from said barge and are believed to have been killed and their remains entirely destroyed in said fire and explosion; that after said fire commenced the steamer "El Occidente" which was moored in a safe position to the easterly side of Pier B Southern Pacific Docks, took a line from another vessel, to proceed out of the said slip. While the "El Occidente" was proceeding out of the slip she was so negligently handled that she came in contact with the burning "Bolikow" as aforesaid, and caught fire, sustaining damage by reason thereof. The said "El Occidente" then called for the services of other vessels to extricate her from the dangerous position in which she had been placed as a result of the negligent handling aforesaid, and by reason of all of which your libelant is informed and verily believes various claims for salvage have been made against said vessel and also against other vessels who, whether of necessity or otherwise, had caused their positions to be shifted at the time of said fire.

Fifth. That the aforesaid explosion the barge "Bolikow" and the consequent fire resulting in the destruction of said barge and damage to other property and loss of life as well as injury to persons in the vicinity thereof or any other loss, injury or damage, which may be claimed to have been caused by the explosion and fire on board the said barge "Bolikow" were not caused or contributed to by any fault, neglect or want of care on the part of your petitioner, its agents, servants and employees, nor, so far as your petitioner has any knowledge by the Master or crew of said barge, but were due to causes unknown to your petitioner and over which neither your [fol. 8] petitioner, its agents, servants and employees had any control and for which neither they, nor any of them were responsible.

Sixth. That any and all damage sustained by any and all persons from the said explosion after the tug "Barwick" attempted to pull the burning "Bolikow" out of the slip, was not caused nor contributed to by your petitioner or by any of its agents, servants and employees, but was solely caused by the negligence of those in charge of the steamship "El Occidente" and those in charge of the steamtug "Gertrude," a towing vessel which attempted to move the "El Occidente" from the slip. The following faults are charged against the steamship "El Occidente":

1. In that the steamship "El Occidente" permitted all her lines which made her fast to Pier B to be cast off, instead of keeping sufficient lines to Pier B to permit her to be warped to the end of the pier and to prevent her from drifting into contact with the "Bolikow."

2. In that the steamship "El Occidente" accepted the services of a towing tug the "Gertrude," which was of wholly insufficient power to tow her.

3. In that the steamship "El Occidente" neglected to warp herself to the end of the pier by means of her winches and other auxiliaries.

4. In that the steamship "El Occidente" was in a safe place and was at fault for attempting to move from that place, when it should [fol. 9] have been apparent to those in charge of her that to cast off all lines would bring her in contact with the burning "Bolikow."

The following faults are charged against the tug "Gertrude":

1. In that the tug "Gertrude" attempted to pull the steamship "El Occidente" out of the slip, the tug "Gertrude" being of insufficient power to carry out the task which she undertook.

2. In that the tug "Gertrude" was not properly manned and equipped for the services which she undertook to perform.

3. In that those in charge of the tug "Gertrude" failed to warn those in charge of the "El Occidente" that the lines of the "El Occidente" should not be cast off, but they should be used for the purpose of warping the ship out of the slip.

4. In that those in charge of the tug "Gertrude" undertook to move the "El Occidente" when the "El Occidente" was in a safe place where she lay.

5. In that although the tide was running strong flood the tug "Gertrude" instead of heading into the tide headed across the tide which carried her upstream and against the outer end of Pier B, thus causing a strain on the hawser from the "Gertrude" to the "El Occidente" and bringing the bow of the "El Occidente" against the corner of Pier B and causing the stern of the "El Occidente" to swing [fol. 10] across the slip between Piers A and B, the starboard quarter of the "El Occidente" becoming jammed against the starboard side of the burning "Bolikow," preventing the removal of the "Bolikow" from the slip.

Seventh. That the said barge "Bolikow" prior to and up to the time of the said explosion and fire, was tight, staunch, strong and in all respects seaworthy, and that she was properly manned and equipped in all respects suitable for carrying on the trade and commercial purposes in which she was then engaged and that the said barge was specially constructed, equipped, fitted and manned to meet all lawful requirements, to engage in the work which she was carrying on at the time of said explosion and that all safeguards, known and customarily in use at the time the vessel was engaged in said trade and industry, were used and installed upon said vessel to safeguard against and prevent fire and explosion and any other accident aboard said vessel.

Eighth. That the said barge "Bolikow" had been inspected and passed on by the United States Government Inspectors as being safe and fit and properly equipped with all modern appliances and safeguards necessary to safely carry crude oil, and that the said barge, at the time of the said fire and explosion, had been carefully maintained up to the requirements of said inspection, and that there was no negligent act or omission of any kind whatever chargeable to your petitioner and its servants and employees.

Ninth. That the said explosion on said barge "Bolikow" and the [fol. 11] subsequent burning of said vessel and cargo as well as the damage, injury and total loss to said barge "Bolikow" as well as all of such other damage and injuries as have been heretofore set forth in this petition were done, occasioned and occurred without any fault on the part of your libelant and petitioner and without its privity and knowledge, but that certain persons have filed libels and other processes against your petitioner and that your petitioner is informed and verily believes that other persons are threatening and in fact, in some instances, have stated their intentions to file libels against your petitioner, by reason of said occurrences and that the following is a list of the said suits and claims known to and anticipated by your petitioner:

1. Claim of the Southern Pacific Company for alleged damage and injury to the S. S. "El Occidente," demurrage thereon and salvage

services rendered thereto, all in excess of $484,000, for which an action is now pending against your petitioner in the United States District Court, for the Southern District of Texas.

2. Claim of Voneata West, wife of James W. West, deceased, mate on said barge "Bolikow," who was killed as a result of said explosion, for herself, Sylvia West, James Westerly West, Violet West and Baby West, an unnamed female child, minors, children of said James West and Voneata West, residing on Grand Camayan Island, West Indies, upon which claim an action is now pending against your petitioner in the United States District Court for the Southern District of Texas and in the libel in which the amount demanded is $50,000.

3. Claim of John Fuertado of said Grand Camayan Island against the Oil Transport Company for personal injuries claimed to have [fol. 12] been sustained as a result of said explosion, for $15,000 for which an action is now pending against your petitioner in the United States District Court for the Southern District of Texas.

In addition to the foregoing the following claims are threatened or may be presented against your petitioner:

4. Claim of the heirs or legal representatives of Vincent Nievs of Mexico for fatal injury as a result of the said explosion.

5. Claim of the heirs or legal representatives of Jack Foldich of Jugo Slavia for fatal injuries as a result of said explosion.

6. Claim of the owners and/or operators of the S. S. "Cranford" for salvage services in removing said steamship from Pier A and from the vicinity of the said burning barge "Bolikow."

7. Claim of the owner or owners of the aforesaid Pier A and B of the said Southern Pacific docks for damage thereto and to other property belonging to it or them, or under its or their custody or control at said terminals in the city of Galveston, State of Texas.

Of the amounts of said claims numbered 4 to 7, your petitioner has as yet no knowledge.

Tenth. In addition to the above, which are all the petitioner now has knowledge, it is feared that other claims or actions may be brought against it by other parties who may have sustained loss or [fol. 13] damage or injury by reason of the aforesaid explosion and your petitioner avers that the amount of the claims aforesaid do far exceed the value of its interest in the said wooden oil tank barge "Bolikow" or its pending freight.

Eleventh. Your petitioner desires to claim the benefits of provisions of Sections 4283-4284-4285 of the Revised Statutes of the United States and the Acts amendatory thereof and supplemental thereto, and in this proceeding, by reason of the facts and circumstances herein set forth, your petitioner further desires to contest its liability and the liability of the said barge "Bolikow" to any extent

whatever for any and all loss, destruction and damage caused by or resulting from the aforesaid explosion and burning of the aforesaid barge "Bolikow" or any other occurrences hereinabove mentioned.

Twelfth. All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your Petitioner prays that this Court will cause due appraisement to be had of the amount of the value of its interest in the wooden oil tank barge "Bolikow" after the aforesaid explosion and at the time of the cessation of the burning thereof as a result of the aforesaid explosion, which occurred on the 23rd day of December, 1920, and will make an order for the payment of the same into Court or for the giving of a stipulation, with sureties providing for the payment thereof as ordered by the Court, and granting leave to the petitioner to file and ad interim stipulation pending the appraisal of the petitioner's said interest in said barge [fol. 14] "Bolikow" and her pending freight, if any; that the Court will issue monition to all persons having any claim for any or all damage, loss, destruction or injury caused by or resulting from the said explosion and burning of said barge "Bolikow" or in any way arising out of any of the facts or circumstances, hereinabove set forth, requiring them to appear before a commissioner to be appointed by the Court and make due proof of all respective claims at or before a certain time to be fixed by said writ and also to appear and answer on oath the allegations of this petition, according to law and practice of this Court and that this Court will issue an injunction restraining the commencement of prosecution of any suit or action by any of the persons hereinbefore set forth in paragraph five of this petition or any other person or persons who may have or claim to have any cause or causes of action against the said barge "Bolikow" or her owners arising out of any of the circumstances hereinabove set forth and the commencement or prosecution here after of any and all claims and any suit or suits, action or actions or legal proceedings of any nature or description whatsoever, except in the present proceeding; against the petitioner or the said barge "Bolikow," in respect of any claim or claims arising out of the said explosion and burning of the said barge "Bolikow" or any of the circumstances hereinabove set forth; and that the Court in this proceeding would adjudge that the petitioner and the said barge "Bolikow" are not and neither of them is liable to any extent for any loss, damage or injury arising therefrom; or, if it shall adjudge that they or any of them are liable then that the liability of the petitioner be limited to the amount of the value of its interest in the said barge "Bolikow" at the time of the cessation of the burning or fire of said barge "Bolikow" resulting from said [fol. 15] explosion and that the monies or security to be paid as aforesaid be divided pro rata among said claimants as may duly prove their claims before the commissioner hereinabove referred to, saving to all parties any priority to which they may be legally

entitled and that your petitioner may have such other and further relief as may be just.

Harrington, Bigham & Englar, Proctors for Petitioner.

Office and Postoffice Adress: No. 64 Wall Street, Borough of Manhattan, City of New York.

Sworn to by R. J. Barry. Jurat omitted in printing.

[fol. 16] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

CLAIM OF SOUTHERN PACIFIC COMPANY—Filed Jan. 9, 1922

Now comes Southern Pacific Company in the above matter and makes claim against the above named National Oil Transport Company and said Barge "Bolikow," as follows:

I.

Said Southern Pacific Company is and at all times hereinafter mentioned, was a corporation duly and legally incorporated, created, [fol. 17] organized and existing under and by virtue of the laws of the State of Kentucky and is now and was at all said times sole owner of the Steamship "El Occidente," her engines, etc.

On the 23d day of December, 1920, said Steamship "El Occidente," about 430 feet in length and about 53 feet in breadth, was lying in the navigable waters of Galveston Bay, in the Harbor of Galveston, in Southern Pacific Terminal Company's Slip "A" made fast to the Easterly side of Pier "B" of said Southern Pacific Terminal Company's system of docks and slips at the city and Port of Galveston, Texas, about the middle of the Easterly side of said Pier "B," with no steam, except on her donkey boiler, for the purpose of taking on cargo for New York, her port side lying next to said pier and her bow pointing to the Northward and towards the open or channel end of said slip past which the channel in Galveston Harbor runs in an Easterly and Westerly direction and toward the Northeast corner of said Pier "B," which is situated at the channel or open end of the slip, the entire length of the slip along the Easterly side of Pier "B" being approximately 1,400 feet and its width across about 250 feet. The Derrick Barge "Atlas" was moored in said slip to the Easterly side of Pier "B" astern of "El Occidente." No other vessel lay at the Easterly side of Pier "B." Said wooden oil tank barge "Bolikow" about 267 feet long and about 46 feet wide, was lying in the opposite side of the same slip made fast to the Westerly

side of Southern Pacific Terminal Company's Pier "A" of its said system of docks and slips, her bow pointing to the Southward and [fol. 18] towards the closed or inshore end of the slip, and her stem approximately 60 feet to 125 feet further Northward than the stem of "El Occidente," some other vessels also lying at the Westerly side of Pier "A." The "Bolikow" was laden with a cargo of crude Mexican fuel oil from which no gasoline had been extracted and which was inflammable and which gave off gases that were in the highest degree inflammable and explosive, which cargo had been partly discharged through a pipe line to the shore, and preparations were being made to continue discharging said cargo. The "Bolikow" was not a self-propelling vessel, but had a boiler for operating her pumps in loading and discharging cargo and for other purposes, and there was steam up in said boiler and fire under it, at and before the times hereinafter mentioned. About 1:50 P. M. on said day an explosion or a series of explosions of terrific force occurred on board the "Bolikow" and said barge and her cargo immediately took fire and burned with great fierceness, throwing up fierce flames and volumes of smoke. As soon as the explosion or explosions occurred the Master of "El Occidente" blew the signal used for calling Suderman & Young's tugs, sounded fire quarters and had all hands mustered to their fire stations, and they commenced playing a number of streams of water through "El Occidente's" hose over her decks, houses and superstructures and in a few minutes the tug "Charles Clarke" one of the tugs operated by Suderman & Young, and also used at the time by the City of Galveston as a fire boat and part of its Fire Department came in the slip and alongside or near to the burning barge. The Master of "El Occidente" who was now on her bridge, thought the "Clarke" was going to pull the "Bolikow" out of the slip and so [fol. 19] believed for several minutes, but instead the "Clarke" began playing water through her hose on the "Bolikow." When the Master of "El Occidente" saw that the "Clarke" was not going to pull the "Bolikow" out, nor come to the assistance of "El Occidente," he started to attempt to warp "El Occidente" out of the slip, but at this time the Tug "Gertrude" came into the slip and manoeuvred her stern clos- under the bow of "El Occidente" and took a line from "El Occidente" for the purpose of pulling her out of the slip, and got a strain on the line and started pulling "El Occidente" towards the open end of the slip. "El Occidente's" made fast lines to the pier being at the same time cast off. But before "El Occidente" started to move from the pier or just as she started to move she caught fire on her starboard side from the bridge aft from the fire and the heat of the fire that was now raging on the Barge "Bolikow" and "El Occidente's" superstructure commenced to burn fiercely the fire spreading as far forward as No. 2 Hold. There was a flood tide running towards the West past the open or channel end of the slip and the wind was from the Northeast and in endeavoring to pull "El Occidente" out of the slip the "Gertrude" got "El Occidente's" bow against the Northeast corner of Pier "B," the "Gertrude" then being to the Westward or Northward of said

corner of Pier "B" and the "Occidente" started to sag back into the slip and towards the burning barge, but some of those on the pier, aided by others on the "El Occidente" succeeded in getting lines from her around mooring posts near said Northeast corner of Pier "B" by which she was brought up and her backward movement stopped, but her stern swung over across the slip towards or against the burning barge "Bolikow," the fire on "El Occidente" increasing in [fol. 20] fierceness and intensity all the time and particularly around her starboard quarter. As "El Occidente" moved towards the channel end of the slip and while her bow was up against the Northeast corner of Pier "B" burning oil escaped from the burning Barge "Bolikow" and floating on the surface of the slip came in contact with "El Occidente's" hull plating, particularly on her starboard side aft of No. 2 Hatch and around her stern, subjecting the hull plating to intense heat. About this time the Tug "Charles Clarke" went to the "Gertrude" and either passed a line to her or took a line from her bow and commenced to pull on her and straighten her across the channel and pulled on her and straightened her out until both the "Clarke" and the "Gertrude" were in a position to pull "El Occidente" straight ahead across the channel and they did commence to pull her. While the "Clarke" was getting the "Gertrude" straightened out across the channel the "Barwick" came under "El Occidente's" bow and "El Occidente" passed the "Barwick" a towing line from her starboard bow which the "Barwick" took and commenced to pull on "El Occidente," the lines by which "El Occidente" had been held to the Northeast corner of Pier "B" being thrown off about the same time and the Tugs "Barwick," "Clarke" and "Gertrude," all three pulled "El Occidente" out of the slip and across the channel to a position on the North side of it where "El Occidente" anchored. When the "Gertrude" started pulling "El Occidente" out of the slip the latter's life boats on the port side were lowered to the rail by order of her Master, and afterwards were lowered into the water, and before she got out of the slip most of her crew went ashore in the lifeboats and by other means, but re- [fol. 21] turned on board after she anchored. From the time the call to fire quarters was sounded on "El Occidente" and her crew commenced to play streams of water upon her, they continued to do so as long as practicable, and when they desisted the pumps were left working and the donkey boiler furnished steam until after "El Occidente" was anchored on the North side of the channel, water all the time pouring through her hydrants and hose, and her crew when they returned on board took up the hose and commenced to play streams of water through them on the fire and thereafter continued to do so until the steam was turned into the fuel tanks, and during the same time they took hose from various tugs that came alongside and manned the same and poured water through them on the fire. When "El Occidente" was first anchored the "Clarke" left and rendered no further service, but the "Barwick" and "Gertrude" remained and pumped water on to the fire that was burning on the "Occidente" through their hose, which were manned and

handled on board by "El Occidente's" officers and crew and by Captain P. C. Grening, then port captain for the J. H. W. Steele Company in Galveston, who came on board "El Occidente" some time after the explosion on the "Bolikow." The tugs "Messenger," "Wm. J. Kelley," "Helen" and "Zoe" also came to the "El Occidente" and pumped water upon the fire both above and below decks the fire having extended below decks, through hose manned by the officers and crew of "El Occidente," the major part of the wooden structures inside said "El Occidente" having caught fire as well as her superstructure and other parts of the vessel. However, the "Barwick" at this time remained by the "Occidente" only a short time, but later returned and again pumped water on the fire through the "Barwick's" own hose and a hose furnished by "El Occidente." [fol. 22] The fire on "El Occidente" was entirely extinguished about seven o'clock P. M.

III

The "Barwick," the "Bolikow" and the Steam Tug "Barryton" were all owned, operated, controlled and managed by libelant, National Oil Transport Company, which, with its tugs, barges and vessels, including the "Barwick," the "Bolikow," and the "Barryton" was engaged in the business of transporting crude fuel oil and probably other oil to the Port of Galveston and probably elsewhere for the National Oil Company, in accordance with the terms and provisions of an agreement or arrangement between them, the details of which are unknown to claimant, but fully known to petitioner. In the performance of said transportation service, petitioner loaded into the "Bolikow" at Tampico or elsewhere, a cargo of crude Mexican fuel oil for and belonging to the National Oil Company and with its tug "Barryton" towed the "Bolikow" and said cargo laden on board of her to the Port of Galveston and within the corporate limits of the city of Galveston and into said Slip "A" on or about the 21st day of December, 1920, and moored the "Bolikow" thus laden to the Westerly side of said Pier "A" and the "Barryton" departed leaving the "Bolikow" unattended by any tug or towboat or assistance of any kind and she so remained until the explosion and fire.

IV

As was well known to the National Oil Transport Company the [fol. 23] Barge "Bolikow" was unseaworthy, unsafe and unfit for the transportation and handling of the cargo of crude oil with which she was laden as aforesaid, in several particulars and among others, the following: she was a wooden barge and had in her, as a part of her construction a number of wooden oil tanks for the storage of oil during transportation, and in which or in some of which her cargo was stored at the time of the explosion and fire, and said barge and said oil tanks were so constructed as to leave vacant spaces between the walls of said tanks and particularly the fore and aft outside walls thereof and the outside skin or hull of said barge, in which the gases

thrown off by the oil cargo would accumulate and be confined and no means of ventilation or no sufficient means of ventilation were provided for the escape or removal of said accumulation of gas therein; she was not equipped or was inadequately equipped with steam smothering pipes for the smothering and killing of gas from her cargo and the extinguishment of fire and the prevention of explosion from the gases thrown off by the oil, or such steam smothering pipes as she was equipped with, if any, were either so out of condition as to be useless or no attempt was made to use them; she was not equipped with a steam jet kept continuously in operation while her oil cargo was being heated for the purpose of smothering, killing or expelling the gases thrown off by said cargo and at the time of said explosion and fire her oil cargo was being heated; her cargo tanks permitted the escape and accumulation throughout the vessel under deck of gases thrown off by her oil cargo; her cargo tanks were of wooden construction instead of steel or iron; her cargo tanks were not air tight and permitted the entrance therein of oxygen and the [fol. 24] mixture of such oxygen with gases arising from the crude oil cargo in proportions creating an explosive gas; she was not provided or equipped with a Foamite Fire Extinguishing System for the extinguishment of fires after explosions or at any time, nor was she equipped with any fire extinguishing apparatus or system whatever; each of her cargo tanks was connected with a large cargo ventilator of the cowl type, extending from inside the tank through and above the deck through which air entered and gas escaped from the cargo and none of said ventilators was equipped or protected with screens to prevent the escaping gas from becoming ignited by sparks or other agencies or if so ignited to prevent the flame from passing down the ventilator, or to prevent the entrance through said ventilators of sparks or flames; none of said ventilators were equipped with double screens; her smoke stack from her boiler room or fire room and the smoke pipe from her galley stove or range, through both of which sparks and flame and burning soot escaped from time to time were not equipped or provided with a screen to prevent the escape of sparks, flame and burning soot therefrom; at the time of the explosion and fire she had a fire burning under her boiler and in the galley stove or range; the small vent pipes from her cargo tank ended in an elbow at the upper end instead of a goose neck or inverted "J" and none of them were equipped or provided with any spark screen; that persons were permitted to smoke on board said barge laden as aforesaid with oil cargo giving off said highly inflammable and explosive gases; said barge was unseaworthy, unfit and unsafe for the purpose aforesaid in other respects not known to claimant, but well known to said National Oil Transport Company and each and all [fol. 25] the aforesaid unfit, unsafe and unseaworthy conditions and the aforesaid negligent acts and omissions of said National Oil Transport Company, its servants, agents and employees directly and proximately caused the explosion and fire on said barge and the fire which burned, injured and damaged "El Occidente," her tackle, apparel, furniture, engines, etc., and all loss, injuries, expense and damages incidental thereto or arising therefrom suffered by claimant.

Either a spark or other agent, ignited the negligently, improperly and insufficiently protected or wholly unprotected escaping gas from said cargo, or the oil itself and the resulting explosion and fire was thus caused or the accumulation of gas under deck or in the spaces between the walls of the cargo tanks and the outside skin of the ship or the escaping gas became ignited through some negligent act or omission, unknown to claimant of said National Oil Transport Company, its servants, agents and employees, well known to them, all of whom were in the exclusive, actual possession, management and control of said Barge "Bolikow," and her cargo, at the time of the explosion and fire. It is true said barge and her cargo was at the time of said explosion and fire in the legal custody of the United States Marshal for the Southern District of Texas under a Writ of Seizure issued in a suit in Admiralty pending in the United States District Court for the Southern District of Texas, Galveston Division, under which Writ said Marshal had seized said barge "Bolikow" and her cargo and posted notices of said seizure thereon and had placed a watchman on said Bolikow, who, however, at the time of said explosion and fire, was not on board said vessel; and at the utmost neither said Marshal nor said watchman interfered in anywise with [fol. 26] the actual physical custody and control of said barge "Bolikow" or her cargo, by her owners, their officers and agents and the master and crew thereof, and at the time of said explosion and fire they were not exercising and did not exercise any management or control over said vessel or cargo for any purpose whatsoever, except to see that the same were not removed from the jurisdiction of said Court.

V

Said National Oil Transport Company was guilty of negligence in the following particulars, all which negligence directly and proximately caused the explosion and fire on the "Bolikow" and the burning of and fire on "El Occidente" and the loss, injury and damage resulting therefrom suffered by claimant:

In using and permitting the use of a wooden barge with wooden cargo tanks for the handling and transportation of a cargo of crude Mexican fuel oil, from which none of the gasoline had been extracted, which oil was highly inflammable and which gave off and threw off gases which were explosive and inflammable, in the highest degree;

Said wooden barge had in her, as a part of her construction a number of wooden oil tanks for the storage of oil during transportation, and in which or in some of which her cargo was stored at the time of the explosion and fire, and said barge and said oil tanks were so constructed as to leave vacant spaces between the walls of said tanks and particularly the fore and aft outside walls thereof and the outside skin or hull of said barge in which the gases thrown off by said oil cargo would and did accumulate and was confined and no [fol. 27] means of ventilation or not sufficient means of ventilation were provided for the escape or removal or said accumulation of gas therein.

She was not equipped or was inadequately equipped with steam smothering pipes for the smothering and killing and expelling of gas thrown off from her cargo and the extinguishment of fire and the prevention of explosion from the gases thrown off by the oil, or such steam smothering pipes as she was equipped with, if any, were either so out of condition as to be useless or no attempt was made to use them. She was not equipped with a steam jet kept continuously in operation while her oil cargo was being heated nor at any other time, for the purpose of smothering, killing or expelling the gases thrown off by said cargo, and at the time of said explosion and fire her oil cargo was being heated;

Her cargo tanks permitted the escape and accumulation throughout the vessel under deck of gases thrown off by her oil cargo;

Her cargo tanks were of wooden construction instead of steel or iron;

Her cargo tanks were not air tight and permitted the entrance therein of oxygen and the mixture of such oxygen with gases arising from the crude oil in proportions creating an explosive gas;

She was not provided or equipped with a Foamite fire extinguishing system for the extinguishment of fires after explosions or at any other time, nor was she equipped with any fire extinguishing apparatus or system whatever;

Each or her cargo tanks was connected with a large cargo ventilator of the cowl type extending from inside the tank through and above the deck through which air entered and gas escaped from the [fol. 28] cargo, and none of said ventilators was equipped or protected with screens to prevent the escaping gas from becoming ignited by sparks or other agencies, or if so ignited to prevent the flame from passing down the ventilator or to prevent the entrance through said ventilators of sparks or flames;

None of said ventilators were equipped with double screens;

Her smoke stack from her boiler room or fire room and the smoke pipe from her galley stove or range, through both of which sparks and flame and burning soot escaped from time to time, were not equipped or provided with screens to prevent the escape of sparks, flame and burning soot therefrom, and at the time of the explosion and fire she had a fire burning under her boiler and in the galley stove or range;

The small vent pipes from her cargo tanks ended in an elbow at the upper end instead of a goose neck or inverted "J" and none of them were equipped or provided with any screens;

That persons were permitted to smoke on board said barge, laden as aforesaid with oil cargo giving off said highly inflammable and explosive gases;

That said wooden cargo tanks in said barge were not so separated and partitioned off from each other as to prevent gases accumulating in one tank to escape into another tank or part of the vessel;

That said large cowl cargo ventilators connected with said cargo tanks permitted the entrance into said tanks, of air causing the evaporation of the oil cargo therein and causing said oil to throw off highly dangerous inflammable and explosive gases which ac-

cumulated in said tanks and other portions of said vessel and escaped in large quantities through said ventilators;

[fol. 29] That no means or equipment was provided for the expulsion or elimination of gases accumulating in the aforesaid spaces between the walls of the cargo tanks and the outside skin of the vessel;

That the Marine Superintendent of petitioner employed and placed by petitioner in charge of the management, operation and supervision of said barge and her cargoes and the master employed by said petitioner to navigate, operate handle and have charge of said barge and her cargoes were wholly without experience in the handling of bulk cargoes of crude Mexican Petroleum oil or the safe and proper equipment of vessels used for that purpose. No watch was set or maintained to prevent the ignition of the gas escaping from the "Bolikow's" cargo or accumulated in her cargo tanks or elsewhere by means of sparks or other agencies, and to prevent the approach to the "Bolikow" of persons smoking or carrying about their persons matches or other means from which ignition might result;

The said Barge "Bolikow" laden as aforesaid was moored and left moored at said Pier "A" unattended by any tug towboat or assistance of any kind.

In other particulars and respects not now known to claimant but well known to said National Oil Transport Company;

VI

And in any event, said cargo of crude oil with which the "Bolikow" was laden was inflammable and gave off gases that were explosive, inflammable and combustible in the highest degree, as was well known to the National Oil Transport Company, its servants, agents and employees, and they were each and all charged with the [fol. 30] exercise of a very high degree of care, if not, indeed, the very highest degree of care of which human foresight is capable, to prevent injury to others thereby, and at the time of the explosion and consequent fire on the "Bolikow" they were in the exclusive actual possession, management and control of the "Bolikow" and her said cargo (except to the extent stated in preceding Article IV in connection with the seizure of said barge and her cargo by the United States Marshal which statement is hereby referred to and adopted without repetition) and negligently caused or permitted said oil or gas or both to become ignited explode and catch on fire and set fire to the "Bolikow" herself and to claimant's steamship "El Occidente", and in the ordinary course of things said explosion and fire would not have occurred had the National Oil Transport Company, its servants, agents and employees, not been negligent, and such negligence, the nature and character of which is unknown to claimant was the direct and proximate cause of the explosion and fire on the "Bolikow" and the burning and injury of "El Occidente" and the loss, injury expense and damage incidental thereto and resulting therefrom suffered by claimant.

VII

Directly resulting from and caused by the fire "El Occidente", her tackle, apparel, furniture, equipment and appurtenances were greatly injured and damaged. Her starboard side suffered worst. Her hull plating from light water line up was badly buckled. The starboard side of her deck house, deck plating in the main and between decks and in the lower between decks was badly buckled. All her super-structures on the starboard side of the boat deck were [fol. 31] burned away, together with boat bridges and life boats No. 1 and No. 2 and all equipment and derricks 3 and 4, and all running gear and wire rigging and wooden hurricane deck were badly burned. Her after wheel house and steering engine room and main engine room were completely burned out. All state rooms on her starboard side were more or less damaged, her rudder was bent and more or less damaged, and at least one blade of her propeller fused, and she was otherwise and in other parts greatly damaged and injured by said fire. In this connection claimant refers to and asks to be taken as a part hereof, the surveys and specifications showing the damages to "El Occidente" and the repairs and expenses necessary to make same good, attached to claimant's answers to the interrogatories propounded to it by said National Oil Transport Company in Cause No. 1076 on the Admiralty Docket of said Court, entitled National Oil Transport Company, libelant vs. Steamship "El Occidente" her engines etc., on file in said Court in said cause.

That by reason of the burning of said "El Occidente" her tackle, apparel, furniture, equipment and appurtenances by said fire, said claimant has sustained damages and has been compelled to incur and pay large sums of money in making repairs, replacements and renewals to said steamship "El Occidente" her furniture, apparel, equipment, appurtenances, etc., and other expenses caused by and resulting directly from said fire, and in making good the damages done by said fire in the sum of One Hundred Ninety Five Thousand Three Hundred Forty One and 35/100 Dollars ($195,341.35) all as shown in detail in the statement and bill of particulars filed herewith and made a part here of and prayed to be taken and deemed as a part of this claim.

[fol. 32]

VIII

That in consequence of the damages and injuries to "El Occidente" by said fire she was detained at Galveston for twenty one days while temporary repairs were being made upon her in order to enable her to proceed on her voyage to New York, where permanent repairs were made, and for said twenty one days claimant was obliged to pay and did pay in wages to her officers and crew the sum of $4,212.27 and for their subsistence during said twenty one days the further sum of $1,795.50, aggregating for wages and subsistence ($6,007.77).

IX

Said Steamship "El Occidente" was due to sail from Galveston with a full cargo for New York, December 25th, 1920, but directly in consequence of said fire and the resulting damages to her she was necessarily detained at Galveston until January 15th, 1921, while necessary temporary repairs were being made upon her in order to enable her to proceed to New York, where permanent repairs were afterward made, making a detention at Galveston of twenty-one days. She sailed from Galveston January 15th, 1921, and arrived at New York January —, 1921, and finished discharging such cargo as she carried at New York on January 22nd, 1921, and was necessarily detained at New York while necessary permanent repairs of said damages were made on her until March 11th, 1921, when said permanent repairs were completed, making a detention at New York of forty-eight days and a total detention of sixty-nine days and [fol. 33] for and during said period of sixty-nine days said steamship was wholly out of commission and claimant entirely lost and was entirely deprived of her use and the value thereof, the fair and reasonable value of such use for said period being $1,500.00 per day, aggregating the total sum of $103,500.00 which claimant is entitled to recover herein as damages in the nature of demurrage.

That the permanent repairs made necessary by reason of the aforesaid damages could not be made in the Port of Galveston and it became and was necessary for said vessel to proceed from the Port of Galveston to the Port of New York, where said repairs were made and that the expenses of said voyage was the total sum of $6,228.40. That because of the damaged and crippled condition of said vessel resulting from said fire she could only carry a limited amount of cargo and that the total revenue earned from the small amount of cargo which she carried on that occasion amounted to $4,918.00 leaving a net loss of actual expenses over earnings of $1,310.40. That said voyage began on January 16th and ended on January 22nd, 1921, and covered a period of seven days, during which time the owners of said vessel were without the use of the same for the purpose of earning revenue, which use was reasonably worth the sum of $1,500.00 per day net, making a total loss to said owners of the sum of $11,-810.40.

X

That while assisting in fighting said fire on "El Occidente" December 23rd, 1920, A. P. Pederson, her chief mate and J. B. Mathews, a member of her crew received serious personal injuries on account of which as compensation for said injuries and by way of maintenance [fol. 34] and cure claimant was obliged to pay and did pay to said A. P. Pederson the sum of $928.75 and to said J. B. Mathews, the sum of $400.00 which said sums were in every respect reasonable and proper and claimant is entitled to recover the same as a part of its claim.

XI

That there are pending in said Court the following libels against said Steamship "El Occidente" and her owner and against her cargo for alleged salvage services claimed to have been rendered to said vessel and to her cargo on the occasion of said fire, and in which libels claimant, Southern Pacific Company has made claim to said vessel and her cargo, and given stipulations for their release and to abide the final decree in said causes, to-wit:

No. 1062, A. D. R. L. Kilgore, et al., officers and crew of the Tug "Gertrude" against "El Occidente" and cargo, amount claimed, $80,000.00.

Intervention of J. S. Charpentier, et al., officers and crew of the Tug "Barwick," against "El Occidente" and cargo, in above cause No. 1062 A. D. amount claimed "such sum of money or proportion of the value of said vessel "El Occidente" * * * as shall seem meet and reasonable;" Intervention of Charles Clarke, owner of the Tug "Gertrude" against Steamship "El Occidente" and cargo, in above cause No. 1062 A. D. amount claimed $80,000.00.

No. 1093 A. D. J. J. Dalhite et al., Officers and crew of the Tug "Messenger" against steamship "El Occidente" amount claimed, $15,000.00;

[fol. 35] No. 1076 A. D. National Oil Transport Company owner of the Tug "Barwick" against Steamship "El Occidente" etc., amount claimed $250,000.00;

Claimant is informed that said P. C. Grening will file a libel or intervening libel against said Steamship "El Occidente" etc., or against this claimant for alleged salvage services rendered on the occasion of said fire but for what amount claimant is not advised;

It is not now possible and will not be possible before the legal adjudication thereof to state the amount or amounts, if any, that will be allowed in said suits against said Steamship "El Occidente" and/or this claimant.

XII

That said National Oil Transport Company was and is wholly in fault for said explosion and fire and claimant is in no wise in fault therefor.

Wherefore claimant, Southern Pacific Company, makes claim against said National Oil Transport Company and said Barge "Bolikow" for all said sums of money aforesaid, aggregating the total sum of $317,988.27 and further claim in addition thereto against said National Oil Transport Company and said barge for all such sums as may be allowed, awarded or adjudged against it in favor of said libelants, interveners and prospective libelant aforesaid in the hereinbefore mentioned libels and interventions for salvage and prospective libel for salvage, and hereby gives notice of its intention to hold said National Oil Transport Company and said Barge "Bolikow" responsible for all damages which it may sustain by reason of such allowance and adjudication of claims against it and for all monies [fol. 36] which it may be called upon to pay to other persons or cor-

porations for loss or injuries arising from said fire and the consequent damages.

Southern Pacific Company, by H. M. Wilkins, Its General Agent.

STATE OF TEXAS,
County of Galveston,
Southern District of Texas:

H. M. Wilkins, being first duly sworn, on oath deposes and says that he is the General Agent of Southern Pacific Company a corporation, the claimant above named, and is authorized to make this affidavit; that he has read the foregoing claim and statement and bill of particulars therein referred to and made a part thereof and knows the contents of same and that the same and the matters and things therein stated and set forth and the statements therein made and contained are true and that said claim is just and true and no part thereof has ever been paid and all off-sets, payments and credits have been allowed thereon all to the best of his knowledge, information and belief.

That the reason this verification is made by deponent and not claimant is that claimant is a corporation.

H. M. Wilkins.

Subscribed and sworn to before me the undersigned authority by said H. M. Wilkins, this 30th day of December, 1921. Margaret M. Donaldson, Notary Public in and for Galveston County, Texas. (Seal.)

[fol. 37] Statement and bill of particulars and exhibits attached to original claim of Southern Pacific Company not here copied.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF SOUTHERN PACIFIC COMPANY—Filed Dec. 30, 1921

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

Having heretofore made due proof of its claim against said National Oil Transport Company and said Barge "Bolikow" before Leo C. Brady Esquire, heretofore appointed by this Court commissioner herein and presented and filed its said proven claim to and with said Leo C. Brady, commissioner as aforesaid, claimant respondent [fol. 38] Southern Pacific Company, a corporation, duly and legally incorporated, created organized and existing under and by virtue of the laws of the State of Kentucky, answers the libel and petition of

said National Oil Transport Company for limitation of liability and denying any liability herein and contests the right of petitioner to limit its liability and asserting petitioner's full liability to claimant respondent, on information and belief alleges as follows:

I

Claimant respondent admits the allegations contained in the First Article of said petition.

II

Answering the Second Article of said petition claimant respondent admits that on or about the 23d day of December, 1920, the wooden oil tank barge "Bolikow" was made fast to and breasted off from the Westerly side of Pier "A" of the Southern Pacific Terminal Company's system of docks and piers in the City of Galveston, Texas, commonly known as the Southern Pacific Docks, and was laden with a cargo of crude oil from which a large part thereof had been discharged, and that at said time the said Barge "Bolikow" was in the custody of the United States Marshal for the Southern District of Texas (but in the manner and under the circumstances hereinafter set out) and that upon taking possession of said barge said United States Marshal had stopped the discharge of said cargo, but claimant respondent alleges that prior to the explosion and fire hereinafter referred to, said Marshal, with the consent of all interested parties had given permission for the discharging of said cargo to be resumed and continued, and said cargo was at the time of said fire and explosion being heated preparatory to resuming and continuing the discharge thereof.

[fol. 39]

Claimant respondent admits that said Barge "Bolikow" was not a self-propelling vessel, but had a boiler for the operating of her pumps and other auxiliaries used in discharging cargoes of crude oil and, that at the time of said fire and explosion had been for some time and then was heating said crude oil cargo in order to increase the fluidity thereof to enable said cargo to be discharged in the usual and customary manner, but claimant respondent has no knowledge as to whether said heating had been or was being done in accordance with custom or in the customary manner. Claimant respondent admits that at about 1.50 P. M. on the 23d day of December, 1920, at a time when said barge was in the custody of the United States Marshal (but in the manner and under the circumstances hereinafter stated) and at a time when no oil was actually being discharged from said vessel (but while said cargo of oil was being heated preparatory to resuming and continuing the discharge of the same) an explosion occurred on board said barge (but claimant respondent is without knowledge as to whether it occurred in tank No. 2 of said barge nor as to the capacity of said tank No. 2 nor as to the quantity of oil cargo therein). Claimant respondent admits that said barge and her cargo took fire immediately and burned fiercely alongside of Pier "A". Claimant respondent is

without knowledge as to whether before said fire had spread to the apron of Pier "A" the tug "Barwick" came into the slip and made lines fast to the "Bolikow" and began to pull her out of the slip, or as to whether the "Barwick" had gotten said barge under way and [fol. 40] was pulling her out of the slip, but denies that "El Occidente" ever came across the slip and jammed her starboard quarter against the starboard side of the "Bolikow", forcing the "Bolikow" against the apron of Pier "A" and causing the lines between the "Bolikow" and the "Barwick" to part. Claimant respondent is without knowledge as to whether it became impossible to tow the "Bolikow" out of the slip without first removing "El Occidente", but alleges that the "Barwick" did take a line from "El Occidente" and assisted in pulling "El Occidente" out of the slip and placing her in a place of safety (but did not accomplish this alone) and claimant respondent is without knowledge as to whether or not before the "Barwick" could return to the "Bolikow" the fire had spread completely over the "Bolikow" and it was impossible to make other lines fast.

In connection with and referring to the allegations contained in said Second Article of the petition claimant respondent alleges that while it is true that said barge and her cargo were at the time of said explosion and fire in the legal custody of said United States Marshal under a Writ of Seizure issued in a suit in Admiralty pending in the United States District Court for the Southern District of Texas, Galveston Division, under which writ said Marshal had seized said Barge "Bolikow" and her cargo, and posted notices of said seizure thereon, and had placed a watchman on said "Bolikow", who, however, at the time of said explosion and fire was not on board said vessel, at the utmost neither said Marshal nor said watchman interfered in anywise with the actual physical custody and control of said Barge "Bolikow" or her cargo by her owners, their officers and agents and the Master and crew thereof, and at the time of said explosion and fire they were not exercising and did not exercise any [fol. 41] management or control over said vessel or cargo for any purpose whatsoever, except to see that the same were not removed from the jurisdiction of said Court.

III

Answering the Third Article of said petition claimant respondent admits that the value of said Barge "Bolikow" at the termination of said fire was $250.00 but is without knowledge as to whether the amount of her pending freight at the time did not exceed the sum of $11,076.85, and claimant respondent alleges that the value of said Barge "Bolikow" while she was lying made fast to said Pier "A" during the time previous to said fire was enormously in excess of $250.00, and was, indeed, many thousand dollars, her full value not being known to claimant respondent. That said Barge "Bolikow" and the Steam Tug "Barryton" (the value of said Tug "Barryton" being a large sum of money, but her full value not being known to claimant respondent) were both operated, controlled and managed

by petitioner, National Oil Transport Company, which with its tugs, barges and vessels, including the "Bolikow" and the "Barryton" was engaged in the business of transporting crude fuel oil to the Port of Galveston for the National Oil Company and in the performance of said transportation service, petitioner loaded into the "Bolikow" at Tampico or elsewhere a cargo of crude Mexican fuel oil for and belonging to the National Oil Company and with its Tug "Barryton" towed the "Bolikow" and said cargo laden on board of her to the Port of Galveston within the corporate limits of said City of Galveston and into Slip "A" of the Southern Pacific Terminal [fol. 42] Company's system of wharves, piers, docks and slips in the city of Galveston, on or about the 21st day of December, 1920, and moored and made fast the "Bolikow" thus laden to the Westerly side of said Pier "A" and the "Barryton" at once departed leaving the "Bolikow" thus laden to the Westerly side of assistance of any kind and permitted her to so remain until the explosion and fire; and petitioner has not surrendered nor offered to surrender the value of said "Bolikow" as the same was just before the explosion and fire, nor the "Barryton" nor her value.

IV

Claimant respondent admits that, as alleged in the Fourth Article of said petition, after said explosion took place in the Barge "Bolikow" and the fire on board thereof had commenced, the fire spread to adjoining property causing damage thereto; and that some members of the crew of said barge sustained personal injuries by reason of said explosion and that two members of the crew disappeared entirely from said barge and are believed to have been kil-ed and their remains entirely destroyed in said fire and explosion, and that after said fire commenced the steamer "El Occidente" which was moored to the Easterly side of Pier "B", Southern Pacific Docks, took a line from another vessel to-wit: the Tug "Gertrude" to proceed out of said slip, but denies that in proceeding out of said slip said "El Occidente" came in contact with the burning "Bolikow" and thus caught fire and denies that said steamer "El Occidente" was moored in a safe position and claimant respondent alleges the fact to be that said "El Occidente" was moored in a most dangerous and exposed position, directly in the line of the fire that was raging [fol. 43] on the "Bolikow", and which set fire to "El Occidente" while she was yet moored to the Easterly side of Pier "B" and before she proceeded out of the slip being towed by the Tug "Gertrude." Claimant respondent alleges that after said "El Occidente" caught fire as aforesaid and while she was proceeding out of said slip, being towed by the Tug "Gertrude," her port bow came in contact with the Northeast corner of said Pier "B", where her progress was halted for a brief period and while in this position her stern swung towards and probably against the burning "Bolikow", but claimant respondent is without knowledge as to whether this situation resulted from the negligent handling of "El Occidente" by said Tug "Gertrude" but denies that it in anywise resulted from or was

due to the negligent handling of "El Occidente" by her officers or crew. Said "El Occidente" did not then call for the services of other vessels, but the Tug "Barwick" appeared and swung under and past the starboad bow of "El Occidente" and a heaving line was thrown to the "Barwick" from "El Occidente" from her starboard bow, which being entangled was turned loose by the "Barwick" and the "Barwick" repeated the manoeuvre swinging again under and past "El Occidente's" starboard bow and this time another heaving line was thrown from "El Occidente" to the "Barwick" and a towing line from "El Occidente" was thus taken on board by the "Barwick" from "El Occidente's" starboard bow and the "Barwick" then commenced to pull on "El Occidente" and assisted the Tug "Gertrude" and the Tug "Clarke", the "Clarke" having then taken a line from the "Gertrude" to pull "El Occidente" out of the slip and across the channel to the Northerly side thereof, where she anchored. No claims have been made against said Steam ship "El Occidente" for salvage for assisting her out of the slip or for other [fol. 44] services, except those made by the Tug "Gertrude" and the Tug "Barwick" and their respective officers and crews, and the officers and crew of the Tug "Messenger"; and claimant respondent is without knowledge as to whether any claims for salvage have been made against other ves-els or not.

V

Claimant respondent denies all the allegations contained in the Fifth Article of said petition and alleges that the fact is, that said explosion and the consequent fire by which "El Occidente" was seriously burned and damaged were caused and contributed to by the faults, neglect and want of care on the part of petitioner, its managing officers, agents servants and employees, in the particulars and respects hereinafter fully set forth, which were known or by the exercise of the diligence and care required of them should and would have been known to petitioner, its managing officers, agents, servants and employees, and could and should have been avoided and prevented by them, all more fully alleged as follows, to-wit:

Said Barge "Bolikow" was unseaworthy, unsafe and unfit for the transportation and handling of the cargo of crude oil, with which she was laden as aforesaid, and which was inflammable and threw off gases that were inflammable, combustible and explosive in the highest degree, in several particulars and among *other* others the following:

She was a wooden barge, and had in her as a part of her construction, a number of wo-den oil tanks for the storage of oil during transportation and in which, or in some of which, her cargo was [fol. 45] stored at the time of the explosion and fire, and said barge and said oil tanks were so constructed as to leave vacant spaces between the walls of said tanks and particularly the fore and aft outside walls thereof and the outside skin or hull of said barge, in which the gases thrown off by said oil cargo would and did ac-

cumulate and were confined and no means of ventilation or no sufficient means of ventilation were provided for the escape or removal of said accumulations of gas therein;

She was not equipped or was inadequately equipped with steam smothering pipes for the smothering, killing and expelling of gases thrown off by her cargo and the extinguishment of fire and the prevention of explosion from the gases thrown off by the oil, or such steam smothering pipes as she was equipped with, if any, were either so out of condition as to be useless or no attempt was made to use them. She was not equipped with a steam jet kept continuously in operation while her oil cargo was being heated or at any other time for the purpose of smothering, killing or expelling the gases thrown off by said oil and at the time of said explosion and fire her oil cargo was being heated;

Her cargo tanks permitted the escape and accumulation throughout the vessel under deck of gases thrown off by her oil cargo;

Her cargo tanks were of wooden construction instead of steel or iron;

Her tanks were not air tight and permitted the entrance therein of oxygen and the mixture of such oxygen with gases arising from the crude oil cargo in proportions creating an explosive gas;

[fol. 46] She was not provided or equipped with a Foamite Fire Extinguishing System for the extinguishment of fires after explosions or at any other time, nor was she equipped with any fire extinguishing apparatus or system whatever;

Each of her cargo tanks were connected with a large cargo ventilator of the cowl type extending from inside the tank through and above the deck through which air entered and gas escaped from the cargo, and none of said ventilators was equipped or protected with screens to prevent the escaping gas from becoming ignited by sparks or other agencies or if so ignited to prevent the flame from passing down the ventilators or to prevent the entrance through said ventilators of sparks or flames;

None of said ventilators were equipped with double screens;

Her smoke stack from her boiler room or fire room and the smoke pipe from her galley stove or range, through both of which sparks and flame and burning soot escaped from time to time, were not equipped or provided with any screen to prevent the escape of sparks, flame or burning soot therefrom, and at the time of said explosion and fire she had a fire burning under her boiler and in the galley stove or range;

The small vent pipes from her cargo tanks ended in an elbow at the upper end instead of a goose neck or inverted "J" and none of them were equipped or provided with any screens;

That persons were permitted to smoke on board said barge laden as aforesaid with oil giving off said highly inflammable and explosive gases;

[fol. 47] That said wooden cargo tanks in said barges were not so separated and partitioned off from each other as to prevent gases accumulating in one tank escaping into another tank or part of the vessel;

That said large cowl cargo ventilators connecting with said cargo tanks permitted the entrance into said tanks of air causing the evaporation of the oil cargo therein and causing said oil to throw off highly dangerous, inflammable and explosive gases, which accumulated in said tanks and other portions of said vessel and escaped in large quantities through said ventilators;

That no means or equipment was provided for the expulsion or elimination of the gases accumulating in the aforesaid spaces between the walls of the cargo tanks and the outside skin of the vessel;

That the Marine Superintendent of petitioner employed and placed by petitioner in charge of the management, operation and supervision of said barge and her cargoes and the master employed by said petitioner to navigate, operate, handle and have charge of said barge and her cargoes, were wholly without experience in the handling of bulk cargoes of crude Mexican Petroleum Oil or the safe and proper equipment of vessels used for that purpose;

No watch was set or maintained to prevent the ignition of the gases escaping from the "Bolikow's" cargo or accumulated in her cargo tanks or elsewhere, by means of sparks or other agencies and to prevent the approach to the "Bolikow" of persons smoking or carrying about their persons matches or other means from which ignition might result.

[fol. 48] That said Barge "Bolikow" laden as aforesaid, was moored and left moored at said Pier "A" unattended by any tug, towboat or assistance of any kind;

Said barge was unseaworthy, unfit and unsafe for the purposes aforesaid, in other respects not now known to claimant respondent, but well known to said National Oil Transport Company, its managing officers, agents, employees and servants and each and all the aforesaid unfit, unsafe and unseaworthy conditions and the aforesaid negligent acts and omissions of said National Oil Transport Company, its managing officers, its servants, agents and employees, directly and proximately caused the explosion and fire on said barge and the fire which burned, injured and damaged "El Occidente" her tackle, apparel, furniture, engines etc. and all the loss, injuries, expense, and damages incidental thereto or arising therefrom suffered by claimant respondent.

Either a spark or other agent, ignited the negligently, improperly and insufficiently protected, or wholly unprotected escaping gas from said cargo, or the oil itself and the resulting explosion and fire was thus caused, or the accumulation of gas under deck or in the spaces between the walls of the cargo tanks and the outer skin of the ship, or the escaping gas became ignited through some negligent act or omission, unknown to claimant respondent, of said National Oil Transport Company, its servants, agents and employees well known to them, all of whom were in the exclusive, actual, physical possession, management and control of said Barge "Bolikow" and her cargo at the time of the explosion and fire, except that said United States Marshal would not permit her to leave the jurisdiction of said Court.

[fol. 49] VI

Claimant-respondent denies the allegations contained in the Sixth Article of the petition, to the effect that any and all damages sustained by any and all persons from said explosion after the Tug "Barwick" attempted to pull the burning "Bolikow" out of the slip, was not caused nor contributed to by petitioner, nor any of its agents, servants and employees and says on the contrary that said damages were caused and contributed to by the faults, neglects and negligence of said petitioner, its managing officers, its agents servants and employees, in the respects and particulars heretofore in this answer fully set out; and claimant respondent denies that said damages were caused by the negligence of those in charge of the Steamship "El Occidente" and those in charge of the Steam Tug "Gertrude" in any of the particulars alleged in said Sixth Article of said petition.

(1) "El Occidente" was not in fault for permitting her lines by which she was made fast to Pier "B" to be cast off, as in fact they were cast off when the Tug "Gertrude" started to pull "El Occidente" out of the slip, but the casting off of said lines was a proper and seamanlike manoeuvre under the existing facts and circumstances and was done in order that the "Gertrude" might pull effectively on the "Occidente."

(2) The Steamship "El Occidente" was not in fault in accepting the services of the "Gertrude" and said tug was not of insufficient power to tow "El Occidente."

(3) That "El Occidente" was not in fault for failing to warp her-[fol. 50] self or attempt- to warp herself to the end of the pier by means of her winches and other auxiliaries, which would have been a slow and tedious method at the best.

(4) Said steamship "El Occidente" was not moored in a safe place and was not at fault for attempting to move away from that place, but on the contrary was in a very dangerous and exposed place directly in line of the fire that was raging on the "Bolikow" and the burning oil from the "Bolikow" floating on the surface of the slip towards "El Occidente" threatening contact with her hull and hull plating and heating the same to an intense heat and endangering the interior structure of said vessel as well as the hull plating itself, and in fact said "El Occidente" caught fire from the fire on the Barke "Bolikow" before she could be moved away from the place where she was moored.

Claimant respondent denies that the Steam Tug "Gertrude" was at fault in the particulars alleged in the Sixth Article of the petition and says:

(1) That the Tug "Gertrude" was of sufficient power to pull "El Occidente" out of the slip and was not in fault for attempting to do so.

(2) So far as known to claimant respondent, and as appeared to the Master and those in charge of "El Occidente" said tug "Gertrude" was properly manned and equipped for the services she undertook to perform.

(3) The casting off of her lines by "El Occidente" and acceptance of the services of the "Gertrude" were proper and seamanlike manœuvres in the circumstances as well as the failure of "El Occidente" to [fol. 51] attempt to warp herself out of the slip and the "Gertrude" was in no wise in fault for not warning those in charge of "El Occidente" not to cast off her lines and to use them for the purpose of warping the ship out of the slip.

(4) It is true the "Gertrude" did not head into the tide and "El Occidente's" port bow did bring up against the Northeast corner of Pier "B" and her stern did swing across the slip near to or against the burning "Bolikow" but the removal of the "Bolikow" was not thereby prevented, and the Steamship "El Occidente" was already burning fiercely all along her starboard side from about opposite her No. 2 Hatch all the way aft before she ever came in contact with the "Bolikow" and before her stern ever started to swing across the slip.

Claimant respondent alleges that at the time of the explosion on the "Bolikow" and the breaking out of the fire which began at once to burn fiercely and from which great volumes of flame arose to a great height, the Steamship "El Occidente" was moored on the opposite side of a narrow slip from the side on which the "Bolikow" was, with no steam up except on her donkey boiler, and directly in the line of the fire from the "Bolikow" and exposed to the burning oil from the "Bolikow" floating on the surface of the slip and approaching "El Occidente" and after "El Occidente' signalling for the as-istance of tugs and none having responded, the Tug "Gertrude" came into the slip and manœuvred her stern under the bow of "El Occidente," whose master an experienced and competent mariner, exercising his best judgment in the emergency decided that the best thing to be done for the preservation and safety of his ship and believing as he [fol. 52] was justified in doing that the "Gertrude" was able to pull the ship out of the slip, accepted the services of the "Gertrude" and gave her a line and when she was ready to pull on "El Occidente" cast off the lines mooring her to Pier "B" and the "Gertrude" proceeded to tow "El Occidente" out of the slip, but before she could be gotten away from the pier she had already caught fire from the fire on the "Bolikow," which immediately began to increase in intensity and to extend in area until "El Occidente" was burning fiercely practically all along her starboard side.

VII

Claimant respondent denies the allegations contained in the Seventh article of the petition and alleges that prior to and up to the time of the said explosion and fire the Barge "Bolikow" in all the respects and particulars hereinbefore set out in this answer, was not

tight, staunch strong and in all respects seaworthy, and was not properly manned and equipped in all respects suitable for carrying on the trade and commercial purposes in which she was then engaged, and was not specially constructed, equipped fitted and manned to meet all lawful requirements to engage in the work which she was carrying on at the time of said explosion, and that all safe-guards known and customarily in use at the time the vessel was engaged in said trade and industry were not used and installed upon said ves-el to safe-guard against and prevent fire and explosion and any other accident on board said vessel.

VIII

Claimant respondent admits the allegation contained in the Eighth [fol. 53] Article of the petition with reference to the Barge "Bolikow" having been passed on by the United States Government Inspectors as being safe and fit and properly equipped with all modern appliances and safe-guards necessary to safely carry crude oil and alleges that nevertheless said Barge "Bolikow" was not safe and fit and properly equipped with all modern appliances and safe-guards necessary to safely carry crude oil, in all the respects and particulars heretofore in this answer alleged and set-out, and claimant respondent is without knowledge as to whether or not said barge had been maintained even up to the requirements of said inspection and say that all the negligent acts and omissions of petitioner, its managing officers, agents, servants and employees, in this answer heretofore alleged and set out are chargeable to petitioner and its servants and employees.

IX

Claimant respondent denies the allegations contained in the Ninth Article of the petition to the effect that said explosion on said Barge "Bolikow" and the subsequent burning of said vessel and cargo as well as the damage, injury and total loss to said Barge "Bolikow" as well as all such other damage and injuries as are set out in said petition, were done, occasioned and occurred without any fault of petitioner and without its privity and knowledge and on the contrary alleges that said explosion and burning, damage, injury and loss were done, occasioned and occurred by and through the faults, neglect and want of care of petitioner and with its privity and knowledge all as in this answer heretofore fully set out. Claimant respondent admits the allegations of said Ninth Article of the petition with reference to the filing of libels and other processes against petitioner and the threatened filing of others.

[fol. 54] X

Claimant respondent is without knowledge as to the allegations contained in the Tenth Article of the petition.

XI

Claimant respondent admits that petitioner entertains the desires alleged in the Eleventh Article of its petition.

XII

Claimant respondent admits that all and singular the premises of said petition are within the Admiralty and Maritime jurisdiction of this Honorable Court, but denies that same are true.

XIII

In addition to the specific acts of negligence and fault herein before alleged against petitioner. National Oil Transport Company claimant respondent alleges that said cargo of crude oil with which the "Bolikow" was laden was inflammable and the gases thrown off by it were explosive, inflammable and combustible in the highest degree, as was well known to said National Oil Transport Company, its managing officers, servants, agents and employees, and they were each and all charged with the exercise of a very high degree of care, if not indeed, the very highest degree of care of which human foresight is capable to prevent injury to others thereby, and at the time of the explosion and consequent fire on the "Bolikow" they were in exclusive, actual, physical possession, management and con- [fol. 55] trol of the "Bolikow" and her said cargo, except to the extent heretofore stated in this answer in connection with the seizure of said barge and her cargo by said United States Marshall (which statement is hereby referred to and adopted without repetition) and negligently caused or permitted the oil or gas or both on the "Bolikow" to become ignited, explode and catch on fire and set fire to the "Bolikow" herself and to claimant respondent's steamship "El Occidente" and in the ordinary course of things said explosion and fire would not have occurred had said National Oil Transport Company, its managing officers, agents, servants and employes not been negligent and their said negligence the nature and character of which is unknown to claimant respondent was the direct and proximate cause of the explosion and fire on the "Bolikow" and the burning and injury of "El Occidente" and the loss, injury, expense and damage incidental thereto and resulting therefrom suffered by claimant respondent.

XIV

Claimant respondent was at all the times hereinbefore mentioned and still is, the sole owner of said Steamship "El Occidente" her tackle, apparel, furniture, etc., and at the time of said explosion and fire was bailee of the cargo on board said Steamship "El Occidente," at the time of said explosion and fire, consisting of about 550 tons of copper ore.

Claimant respondent prays that petitioner's right to limit its liability be denied and its libel and petition for limitation of liability

be dismissed with costs and that claimant respondent have judgment against petitioner and said barge "Bolikow" for the full amount [fol. 56] of its claim against them and for all such other and further judgments, orders and decrees as to law and justice may appertain.

W. T. Armstrong, W. E. Cranford, Terry, Cavin & Mills, Proctors for Claimant Respondent Southern Pacific Company.

Sworn to by H. M. Wilkins. Jurat omitted in printing.

[fol. 57] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION

No. 1076 A. D.

NATIONAL OIL TRANSPORT COMPANY, Owner of the Steam Tug "Barwick," etc., Libelant.

vs.

Steamship "EL OCCIDENTE," Her Engines, Boilers, Cargo, etc.

AMENDMENTS TO ANSWER—Filed Jan. 23, 1922.

Now comes Southern Pacific Company, respondent herein, and by leave of the Court first had and obtained amends its answer filed in this cause May 27th, 1921, as follows:

First: Strike out Article III of said answer and insert in lieu thereof the following:

III

The allegations of the Third Article of the libel are denied except those hereinafter admitted, and those with reference to which respondent has no knowledge, as hereinafter stated, and respondent [fol. 58] alleges as follows: On the 23rd day of December, 1920, said Steamship "El Occidente" about 430 feet in length and about 53 feet in breadth, was lying in the navigable waters of Galveston Bay, in the Harbor of Galveston, in Southern Pacific Terminal Company's Slip "A" made fast to the Easterly side of Pier "B" of said Southern Pacific Company's terminal Company's system of docks and slips at the City and Port of Galveston, Texas, about the middle of the Easterly side of said Pier "B," with no steam, except on her donkey boiler for the purpose of taking on cargo for New York, her port side lying next to said pier and her bow pointing to the Northward and towards the open or channel end of said slip past which the channel in Galveston Harbor runs in an Easterly and Westerly direction and

toward the Northeast corner of said Pier "B" which is situated at the channel or open end of the slip, the entire length of the slip along the Easterly side of Pier "B," being approximately 1400 feet and its width across about 250 feet. The Derrick Barge "Atlas" was moored in said slip to the Easterly side of Pier "B" astern of "El Occidente." No other vessel lay at the Easterly side of Pier "B." Said wooden oil tank barge "Bolikow" about 267 feet long and about 46 feet wide, was lying in the opposite side of the same slip, made fast to the Westerly side of Southern Pacific Terminal Company's Pier "A" of its said system of docks and slips, her bow pointing to the Southward and towards the closed or inshore end of the slip, and her stem approximately 60 feet to 125 feet further Northward than the stem of "El Occidente," some other vessels also lying at the Westerly side of Pier "A." The "Bolikow" was laden with a cargo of crude Mexican fuel oil from which no gasoline had been extracted and which was inflammable and which gave off gases that were in [fol. 59] the highest degree inflammable and explosive, which cargo had been partly discharged through a pipe line to the shore, and preparations were being made to continue discharging said cargo. The "Bolikow" was not a self-propelling vessel, but had a boiler for operating her pumps in loading and discharging cargo and for other purposes, and there was steam up in said boiler and fire under it, at and before the times hereinafter mentioned. About 1:50 P. M. on said day an explosion or a series of explosions of terrific force occurred on bard the "Bolikow" and said barge and her cargo immediately took fire and burned with great fierceness, throwing up fierce flames and volumes of smoke. As soon as the explosion or explosions occurred the Master of "El Occidente" blew the signal used for calling Suderman & Young's tugs sounded fire quarters and had all hands mustered to their fire stations, and they commenced playing a number of streams of water through "El Occidente's" hose over her decks, houses and superstructure and in a few minutes the tug "Charles Clarke," one of the tugs operated by Suderman & Young, and also used at the time by the City of Galveston as a fire boat and part of its Fire Department, came in the slip and alongside: or near to the burning barge. The Master of "El Occidente" who was now on her bridge, thought the "Clarke-- was going to pull the "Bolikow" out of the slip and so believed for several minutes, but instead, the Clarke began playing water through her hose on the "Bolikow." When the Master of "El Occidente" saw that the "Clarke" was not going to pull the "Bolikow" out, nor come to the assistance of "El Occidente" he started to attempt to warp "El Occidente" out of the slip, but at this time the Tug Gertrude, came into the slip and manoeuvred her stern close under the bow of "El Occidente" and [fol. 60] took a line from "El Occidente" for the purpose of pulling her out of the slip, and got a strain on the line and started pulling "El Occidente" towards the open end of the slip, "El Occidente's" make fast lines to the pier being at the same time cast off. But before "El Occidente" started to move from the pier, or just as she started to move, she caught fire on her starboard side from the bridge aft from the fire and the heat of the fire that was now raging on the

Barge "Bolikow," and "El Occidente's" superstructure commenced to burn fiercely, the fire spreading as far forward as No. 2 Hold. There was a flood tide running towards the West past the open or channel end of the slip and the wind was from the Northeast, and in endeavoring to pull "El Occidente" out of the slip the "Gertrude" got "El Occidente's" bow against the Northeast corner of Pier "B," the "Gertrude" then being to the Westward or Northward of said corner of Pier "B" and the "Occidente" started to sag back into the slip, and towards the burning barge, but some of those on the pier, aided by others on the "El Occidente" succeeded in getting lines from her around mooring posts near said Northeast corner of Pier "B" by which she was brought up and her backward movement stopped, but her stern swung over across the slip towards or against the burning Barge "Bolikow," the fire on "El Occidente" increasing in fierceness and intensity all the time and particularly around her starboard quarter. As "El Occidente" moved towards the channel end of the slip, and while her bow was up against the Northeast corner of Pier "B," burning oil escaped from the burning Barge "Bolikow" and floating on the surface of the slip came in contact with "El Occidente's" hull plating, particularly on her starboard side aft of No. 2 Hatch and around her stern, subjecting the hull plating to intense heat. About this time the Tug "Charles Clarke" [fol. 61] went to the "Gertrude" and either passed a line to her or took a line from her bow and commenced to pull on her and straighten her across the channel and pulled on her and straightened her out until both the "Clarke" and the "Gertrude" were in a position to pull "El Occidente" straight ahead across the channel and they did commence to pull her. While the "Clarke" was getting the "Gertrude" straightened out across the channel the "Barwick" came under "El Occidente's" bow and "El Occidente" passed the "Barwick" a towing line from her starboard bow which the "Barwick" took and commenced to pull on "El Occidente," the lines by which "El Occidente" had been held to the Northeast corner of Pier "B" being thrown off about the same time and the Tugs "Barwick," "Clarke," and "Gertrude" all three pulled "El Occidente" out of the slip and across the channel to a position on the North side of it where "El Occidente" anchored.

When the "Gertrude" started pulling "El Occidente" out of the slip the latter's life boats on the port side were lowered to the rail by order of her Master and afterward were lowered into the water, and before she got out of the slip most of her crew went ashore in the life boats and by other means, but returned on board after she anchored. From the time the call to fire quarters was sounded on "El Occidente" and her crew commenced to play streams of water upon her, they continued to do so as long as practicable, and when they desisted the pumps were left working and the donkey boiler furnished steam until after "El Occidente" was anchored on the North side of the channel, water all the time pouring through her hydrants and hose, and her crew when they returned on board took up the hose and commenced to play streams of water through them on the fire and thereafter continued to do so until the steam was

[fol. 62] turned into the fuel tanks, and during the same time they took hose from various tugs that came alongside and manned the same and poured water through them on the fire. When "El Occidente" was first anchored the "Clarke" left and rendered no further service, but the "Barwick" and "Gertrude" remained and pumped water on to the fire that was burning on the "Occidente" through their hose, which were manned and handled on board by "El Occidente's" officers and crew and by Captain P. C. Grening, then port captain for the J. H. W. Steele Company, in Galveston, who came on board "El Occidente" some time after the explosion on the "Bolikow." The tugs "Messenger," "Wm. J. Kelley," "Helen" and "Zoe" also came to "El Occidente" and pumped water upon the fire both above and below decks, the fire having extended below decks, through hose manned by the officers and crew of "El Occidente," the major part of the wooden structures inside said "El Occidente" having caught fire as well as her superstructure and other parts of the vessel. However, the "Barwick" at this time remained by the "Occidente" only a short time, but later returned and again pumped water on the fire through the "Barwick's" own hose and a hose furnished by "El Occidente." The fire on "El Occidente" was entirely extinguished about seven o'clock P. M.

The "Barwick" rendered some service, but did not render the whole service and was never in danger of destruction, injury or damage. If the "Barwick" ever pulled on the "Bolikow" she did not pull at any time when "El Occidente" was in contact with the barge, and if the towing line from the "Barwick" to the "Bolikow" parted, as to which respondent has no knowledge, it was not because "El Occidente" was holding the "Bolikow" to the dock, and respondent [fol. 63] does not know why those on the "Barwick" did not see that "El Occidente" had cast loose from the dock earlier than they did. If "El Occidente" ever was in contact with the barge, it was not until after her bow was against the Northeast corner of Pier "B." The Barwick did not extinguish the fire on the starboard side of "El Occidente" but assisted in doing so, being aided by other tugs and by "El Occidente" herself, whose crew played streams of water upon her with her own hose and pumps operated with power furnished by her own donkey boilers, as well as through hose furnished by tugs. No one from the "Barwick" ever came aboard "El Occidente" except Captain P. C. Grening, then port engineer or port Captain for the J. H. W. Steele Company of Galveston, and who was neither an officer nor member of the crew of the "Barwick." "El Occidente's" hose lines and those furnished her by the tugs were handled and served exclusively by her own officers and crew as were her pumps and boilers, except that Captain Grenning assisted on board "El Occidente" by helping in handling hose and otherwise. The Master of "El Occidente" did not excuse the "Barwick" after about 45 minutes of the latter's service, but the "Barwick" voluntarily left "El Occidente" and went about his own business. About four o'clock P. M. the "Barwick" did return to "El

Occidente," but by this time the fire was well under control and the "Barwick" sent no men aboard "El Occidente." The "Barwick" did accept a line of $2\frac{1}{2}$ inch New York Corporation Hose and played a stream of water through it on "El Occidente," the latter's crew handling the hose and all other hose aboard "El Occidente." When the "Gertrude" started "El Occidente" out of the slip the latter's life boats on the port side were lowered to the rail by order [fol. 64] of her Master and afterward were lowered into the water and most of the crew went ashore in the life boats. From the time the call to fire quarters was sounded on "El Occidente" and her crew commenced to play streams of water upon her through her own hose, they continued to do so until they were obliged to desist, but the pumps were left working and the donkey boiler furnishing steam until after "El Occidente" was anchored on the North side of the channel and her crew returned aboard, when they again took up the hose and commenced to play streams of water on the fire and thereafter continued to do so.

Second. Strike out Article VIII of said answer and insert in lieu thereof, the following:

VIII

As was well known to the National Oil Transport Company the Barge "Bolikow" was unseaworthy, unsafe and unfit for the transportation and handling of the cargo of crude oil with which she was laden as aforesaid, in several particulars and among others, the following: She was a wooden barge and had in her as a part of her construction a number of wooden oil tanks for the storage of oil during transportation and in which or in some of which her cargo was stored at the time of the explosion and fire, and said barge and said oil tanks were so constructed as to leave vacant spaces between the walls of said tanks and particularly the fore and aft outside walls thereof and the outside skin or hull of said barge in which the gases thrown off by the oil cargo would accumulate and be confined and no means of ventilation or no sufficient means of ventilation [fol. 65] were provided for the escape or removal of said accumulations of gas therein; she was not equipped or was inadequately equipped with steam smothering pipes for the smothering and killing of gas from her cargo and the extinguishment of fire and the prevention of explosion from the gases thrown off by the oil, or such steam smothering pipes as she was equipped with, if any, were either so out of condition as to be useless or no attempt was made to use them; she was not equipped with a steam jet kept continuously in operation while her oil cargo was being heated for the purpose of smothering, killing or expelling the gases thrown off by said cargo and at the time of said explosion and fire her oil cargo was being heated; her cargo tanks permitted the escape and accumulation throughout the vessel under deck, of gases thrown off by her oil cargo; her cargo tanks were of wooden construction instead of steel or iron; her cargo tanks were not air tight and permitted the en-

trance therein of oxygen and the mixture of such oxygen with gases arising from the crude oil cargo in proportions creating an explosive gas; she was not provided or equipped with a Foamite Fire Extinguishing System for the extinguishment of fires after explosions or at any other time, nor was she equipped with any fire extinguishing apparatus or system whatever; each of her cargo tanks was connected with a large cargo ventilator of the cowl type extending from inside the tank through and above the deck through which air entered and gas escaped from the cargo and none of said ventilators was equipped or protected with spark screens to prevent the escaping gas from becoming ignited by sparks or other agencies or if so ignited to prevent the flames from passing down the ventilator, or to prevent the entrance through said ventilators of sparks [fol. 66] or flames; none of said ventilators were equipped with double screens; her smoke stack from her boiler room or fire room and the smoke pipe from her galley stove or range, through both of which sparks and flame and burning soot escaped from time to time were not equipped or provided with a screen to prevent the escape of sparks, flame and burning soot therefrom; at the time of the explosion and fire she had a fire burning under her boiler and in the galley stove or range; the small vent pipes from her cargo tanks ended in an elbow at the upper end instead of a goose neck or inverted "J" and none of them were equipped or provided with any spark screen; that persons were permitted to smoke on board said barge laden as aforesaid with oil cargo giving off said highly inflammable and explosive gases; said barge was unseaworthy, unfit and unsafe for the purpose aforesaid in other respects not known to respondent, but well known to said National Oil Transport Company and each and all the aforesaid unfit, unsafe and unseaworthy conditions and the aforesaid negligent acts and omissions of said National Oil Transport Company, its servants, agents and employees directly and proximately caused the explosion and fire on said barge and the fire which burned, injured and damaged "El Occidente" her tackle, apparel, furniture, engines, etc., and all loss, injuries, expense and damages incidental thereto or arising therefrom suffered by respondent.

Either a spark or other agent, ignited the negligently, improperly and insufficiently protected or wholly unprotected escaping gas from said cargo, or the oil itself and the resulting explosion and fire was thus caused or the accumulation of gas under deck, or in the spaces between the walls of the cargo tanks and the outside [fol. 67] skin of the ship or the escaping gas, became ignited through some negligent act or omission, unknown to respondent, of said National Oil Transport Company, its servants, agents and employees, well known to them, all of whom were in the exclusive, actual possession, management and control of said Barge "Bolikow" and her cargo at the time of the explosion and fire. It is true said barge and her cargo was at the time of said explosion and fire in the legal custody of the United States Marshal for the Southern District of Texas under a writ of seizure issued in a suit in Ad-

mirality pending in the United States District Court for the Southern District of Texas, Galveston Division, under which writ said Marshal had seized said Barge "Bolikow" and her cargo and posted notices of said seizure thereon, and had placed a watchman on said "Bolikow," who, however, at the time of said explosion and fire was not on board said vessel, and at the utmost neither said Marshal nor said watchman interfered in anywise with the actual physical custody and control of said Barge "Bolikow" or her cargo by her owners, their officers and agents and the Master and crew thereof, and at the time of said explosion and fire they were not exercising and did not exercise any management or control over said vessel or cargo for any purpose whatsoever, except to see that the same were not removed from the jurisdiction of said Court.

Third. Strike out Article X of said answer and insert in lieu thereof the following:

X

Said National Oil Transport Company was guilty of negligence in [fol. 68] the following particulars, all which negligence directly and proximately caused the explosion and fire on the "Bolikow" and the burning of and fire on "El Occidente" and the loss, injury and damages resulting therefrom suffered by respondent. In using and permitting the use of a wooden barge with wooden cargo tanks for the handling and transportation of a cargo of crude Mexican fuel oil from which none of the gasoline had been extracted, which oil was highly inflammable and which gave off and threw off gases which were explosive and inflammable in the highest degree:

Said wooden barge had in her, as a part of her construction a number of wooden oil tanks for the storage of oil during transportation and in which or in some of which her cargo was stored at the time of the explosion and fire, and said barge and said oil tanks were so constructed as to leave vacant spaces between the walls of said tanks and particularly the fore and aft outside walls thereof and the outside skin or hull of said barge in which the gases thrown off by said oil cargo would and did accumulate and was confined and no means of ventilation or no sufficient means of ventilation were provided for the escape or removal of said accumulations of gas therein.

She was not equipped or was inadequately equipped with steam smothering pipes for the smothering and killing and expelling of gas thrown off from her cargo and the extinguishment of fire and the prevention of explosion from the gases thrown off by the oil, or such steam smothering pipes as she was equipped with, if any, were either so out of condition as to be useless or no attempt was made to use them.

She was not equipped with a steam jet kept continuously in op- [fol. 69] eration while her oil cargo was being heated nor at any other time, for the purpose of smothering, killing or expelling the gases thrown off by said cargo and at the time of said explosion and fire her oil cargo was being heated;

Her cargo tanks permitted the escape and accumulation throughout the vessel under deck of gases thrown off by her oil cargo.

Her cargo tanks were of wooden construction instead of steel or iron. Her cargo tanks were not air tight and permitted the entrance therein of oxygen and the mixture of such oxygen with gases arising from the crude oil cargo in proportions creating an explosive gas;

She was not provided or equipped with a Foamite fire extinguishing system for the extinguishment of fires after explosions or at any other time, nor was she equipped with any fire extinguishing apparatus or system whatever; Each of her cargo tanks was connected with a large cargo ventilator of the cowl type extending from inside the tank through and above the deck through which air entered and gas escaped from the cargo, and none of said ventilators was equipped or protected with screens to prevent the escaping gas from becoming ignited by sparks or other agencies, or if so ignited to prevent the flame from passing down the ventilator or to prevent the entrance through said ventilators of sparks or flames; None of said ventilators were equipped with double screens; Her smoke stack from her boiler room or fire room and the smoke pipe from her galley stove or range, through both of which sparks and flame and burning soot escaped from time to time were not equipped or provided with screens to prevent the escape of sparks, flames and burning soot therefrom and at the time of the explosion and fire she had [fol. 70] a fire burning under her boiler and in the galley stove or range;

The small vent pipes from her cargo tanks ended in an elbow at the upper end instead of a goose neck or inverted "J" and none of them were equipped or provided with any screens;

That persons were permitted to smoke on board said barges, laden as aforesaid, with oil cargo giving off said highly inflammable and explosive gases; That said wooden cargo tanks in said barge were not so separated and partitioned off from each other as to prevent gases accumulating in one tank to escape into another tank or part of the vessel; That said large cowl cargo ventilators connected with said cargo tanks permitted the entrance into said tanks of air causing the evaporation of the oil cargo therein and causing said oil to throw off highly dangerous, inflammable and explosive gases which accumulated in said tanks and other portions of said vessel and escaped in large quantites through said ventilators; That no means or equipment was provided for the expulsion or elimination of gases accumulating in the aforesaid spaces between the walls of the cargo tanks and the outside skin of the vessel;

That the Marine Superintendent of respondent employed and placed by respondent in charge of the management operation and supervision of said barge and her cargoes, and the master employed by said respondent to navigate, operate, handle and have charge of said barge and her cargoes were wholly without experience in the handling of bulk cargoes of crude Mexican Petroleum Oil, or the safe and proper equipment of vessels used for that purposes;

No watch was set or maintained to prevent the ignition of the gas escaping from the "Bolikow's" cargo, or accumulated in her cargo [fol. 71] tanks or elsewhere, by means of sparks or other agencies, and to prevent the approach to the "Bolikow" of persons smoking or carrying about their persons matches or other means from which ignition might result.

The said Barge "Bolikow," laden as aforesaid, was moored and left moored at said Pier "A" unattended by any tug, towboat or assistance of any kind; In mooring the "Bolikow" at Pier A without a permit from the Harbor Master of the City of Galveston.

In other particulars and respects not now known to respondent but well known to said National Oil Transport Company;

Fourth. Strike out Article XI of said answer and insert in lieu thereof the following:

XI

And in any event, said cargo of crude oil with which the "Bolikow" was laden was inflammable and gave off gases that were explosive, inflammable and combustible in the highest degree, as was well known to the National Oil Transport Company, its servants, agents and employees and they were each and all charged with the exercise of a very high degree of care, if not indeed, the very highest degree of care of which human foresight is capable, to prevent injury to others thereby and at the time of the explosion and consequent fire on the "Bolikow" they were in the exclusive actual possession management and control of the "Bolikow" and her said cargo (except to the extent stated in preceding Article V in connection with the seizure of said barge and her cargo by the United States Marshal which statement is hereby re-referred to and adopted [fol. 72] without repetition) and negligenty caused or permitted said oil or gas or both to become ignited, explode and catch on fire and set fire to the "Bolikow" herself and to respondent's steamship "El Occidente," and in the ordinary course of things said explosion and fire would not have occurred had the National Oil Transport Company, its servants, agents and employees, not been negligent and such negligence, the nature and character of which is unknown to respondent, was the direct and proximate cause of the explosion and fire on the "Bolikow" and the burning and injury of "El Occidente" and the loss, injury, expense and damage incidental thereto and resulting therefrom, suffered by respondent.

Fifth. Strike out of Article XII the words and figures "Respondent cannot yet state in detail the full extent of the damage to "El Occidente" nor the cost and expense of repairing the same, but this information will be furnished in detail as soon as practicable by an appropriate amendment or supplement to this answer, but the aggregate amount thereof is at least the approximate sum of $200,000.00", and insert in lieu thereof the following words and figures:

"In this connection respondent refers to and asks to be taken as a part hereof the surveys and specifications showing the damages

to "El Occidente" and the repairs and expenses necessary to make same good, attached to respondent's answers to the interrogatories propounded to it by said National Oil Transport Company in Cause No. 1076 on the Admiralty Docket of said Court, entitled "National Oil Transport Company, Libelant vs. Steamship "El Occidente," her [fol. 73] engines, etc.," on file in said Court in said cause.

That by reason of the burning of said "El Occidente," her tackle, apparel furniture, equipment and appurtenances by said fire, said respondent has sustained damages and has been compelled to incur and pay large sums of money in making repairs, replacements and renewals to said Steamship "El Occidente" her furniture, apparel, equipment, appurtenances, etc., and other expenses caused by and resulting directly from said fire and in making good the damages done by said fire in the sum of One Hundred Ninety Five Thousand Three Hundred Forty One and 35/100 Dollars ($195,341.35) all as shown in detail in the statement and bill of particulars filed with and made part of respondent's claim against said National Oil Transport Company, heretofore filed with Leo C. Brady, Esquire, appointed by this Court Commissioner before whom claims may be proven. In the matter of the petition of the National Oil Transport Company, as owner of the wooden Oil Tank barge "Bolikow," her tackle, apparel, etc., and her pending freight, for limitation of liability, numbered on the docket of this Court 1123 A. D., which statement and bill of particulars respondent begs leave to refer to and make a part of this answer.

That while assisting in fighting said fire on "El Occidente" December 23rd, 1920, A. P. Pederson, her Chief Mate and J. B. Mathews, a member of her crew, received serious personal injuries on account of which as compensation for said injuries and by way of maintenance [fol. 74] and cure, respondent was obliged to pay and did pay to said A. P. Pederson, the sum of $928.75 and to said J. B. Mathews, the sum of $400.00, which said sums were in every respect reasonable and proper and respondent is entitled to recover the same as a part of its damages herein."

Sixth. Add to Article XIV of said answer the following:

That the permanent repairs made necessary by reason of the aforesaid damages could not be made in the Port of Galveston and it became and was necessary for said vessel to proceed from the Port of Galveston to the Port of New York, where said repairs were made, and that the expense of said voyage was the total sum of $6,228.40. That because of the damaged and crippled condition of said vessel resulting from said fire she could only carry a limited amount of cargo and that the total revenue earned from the small amount of cargo which she carried on said occasion amounted to $4,918.00 leaving a net loss of actual expenses over earnings of $1,310.40. That said voyage began on January 16th and ended on January 22nd, 1921 and covered a period of seven days, during which time the owners of said vessel were without the use of the same for the purpose

of earning revenue, which use was reasonably worth the sum of $1,500.00 per day net, making a total loss to said owners of $11,-810.40.

All and singular the premises are true and within the Admiralty and Maritime Jurisdiction of this Honorable Court.

[fol. 75] Respondent herein renews the prayer of its said answer.

W. T. Armstrong, W. E. Cranford, Terry, Cavin & Mills, Bustingham, Veeder, Mastin & Feorey, Proctors for Respondent Southern Pacific Company.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF R. J. BARRY—Filed Oct. 14, 1921

STATE OF TEXAS,
County of Galveston, ss:

R. J. Barry, being duly sworn, deposes and says:

That he is Vice President in the employ of National Oil Trans-[fol. 76] port Company, that he knows the oil tank barge "Bolikow" and that to his personal knoweldge the value of the bare hulk of said barge "Bolikow" after she was burned as a result of an explosion which occured thereon on the 23rd day of December, 1920, at Galveston, Texas, was but Two Hundred and Fifty ($250.00) Dollars, for which it was sold at auction, and the cargo which was laden on her at said time, was a total loss; that no part of the said barge "Bolikow" except as aforesaid or her said cargo was saved or salved and at the end of her voyage, which terminated in her said burning as a result of said explosion, she was of no value except as aforesaid; that he is familiar with the earnings of the said barge "Bolikow" and that up to the time of the loss and burning of said barge "Bolikow" at the aforesaid time, she had earned on the said voyage just completed or upon which she was engaged not exceeding the sum of Eleven Thousand seventy six and 85/100 ($11,076.85) Dollars.

R. J. Barry.

Subscribed and sworn to before me this 26th day of September, 1921. Isidore Predecki, Notary Public in and for Galveston County, Texas. (Seal.)

[File endorsement omitted.]

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF W. HYLAND—Filed Oct. 14, 1921

STATE OF TEXAS,
County of Galveston, ss:

W. Hyland, being duly sworn, deposes and says:

That he is District Manager in the employ of the petitioner; that he is familiar with the circumstances of the explosion and burning of the wooden oil tank barge "Bolikow," owned and operated by the National Oil Transport Company, which occurred on the 23rd day of December, 1920; that as a result of said explosion and burning the value of the bare hulk of the said barge "Bolikow" was but Two Hundred Fifty ($250.00) Dollars, for which sum it was sold at auction and the cargo thereon were a total loss; and that at the end of the voyage of said barge "Bolikow," which terminated with the said explosion and the said burning thereof, the said barge "Bolikow" was of no value whatsoever except as aforesaid; and that the amount of her pending freight at the end of the voyage which had then just terminated was not in excess of Eleven Thousand Seventy Six and 85/100 Dollars ($11,076.85.)

W. Hyland.

[fol. 78] Sworn to before me this 22nd day of Sept., 1921, C. G. Dibrell, Notary Public, Galveston Co., Texas. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORIGINAL ORDER FOR AN AD INTERIM STIPULATION—Filed Oct. 14, 1921

[fol. 79] A petition having been filed on the tenth day of October, 1921, by the National Oil Transport Company, as owner of the oil tank barge "Bolikow," her tackle, apparel, etc., claiming benefit of the limitation of liability provided for by the Third and Fourth Sections of an Act of Congress, entitled: "An Act to limit the Liability of Ship Owners and for other purposes," passed March 3, 1851, now embodied in Sections 4283-4284-4285 of the Revised Statutes and Statutes supplemental thereto and amendatory thereof, and also contesting its liability independently of the limitation of the liability claimed under said Acts, for any loss, damage or injury resulting from an explosion upon said barge "Bolikow" on the 23rd day of December, 1920, while lying at Pier A of the Southern

Pacific Docks in the city of Galveston in the State of Texas and the subsequent burning of said barge "Bolikow," and damage or injury to other property of any kind whatsoever in the vicinity thereof, or any other occurrences arising out of or in connection with the said explosion upon and burning of said barge "Bolikow" and said petition also stating the facts and circumstances upon which said exemptions from liability are claimed and said petitioner having prayed for an appraisal of the value of its interest in the said barge "Bolikow" and her pending freight, if any, and for leave to file a stipulation for the amount of said value or for an ad interim stipulation pending the appraisal of said interest in said barge "Bolikow" and her pending freight, if any, by commission to [fol. 80] be appointed by this Court; and it appearing from the affidavit of R. J. Barry verified the 26th day of September, 1921, and of W. Hyland vertified the 22nd day of September, 1921, and filed herein; that the value of said barge "Bolikow" at the time of the cessation of the burning thereof, resulting from the said explosion of the said 23rd day of December, 1920, amounted to the sum of Two Hundred and Fifty ($250.00) Dollars, for which sum the burned hulk of said barge "Bolikow" was sold at auction; and from the said affidavit that neither the said barge "Bolikow" her tackle, apparel, etc., or any part thereof; except only the burned hulk of said barge "Bolikow" which was sold for Two Hundred and Fifty ($250.00) Dollars as aforesaid, nor of the cargo thereon were salved or saved after said disaster hereinabove mentioned and in said petition set forth, and it further appearing from the said affidavits of said R. J. Barry and W. Hyland that the freight on the said barge "Bdikow" pending at the time of said disaster did not exceed the sum of Eleven Thousand Seventy Six and 85/100 ($11,076.85) Dollars.

Now on motion of Harrington, Bigham & Englar and Andrews, Streetman Logue & Mobley, proctors for the petition, it is

Ordered that the petitioner file herein an ad interim stipulation for the value of said barge "Bolikow," her tackle, apparel, equipment, etc., with the maximum possible amount of the pending freight at the termination of the said fire on said barge "Bolikow" and of the said voyage on which said barge "Bolikow" was engaged at the time of the said disaster in the sum of Eleven Thousand Three [fol. 81] Hundred Twenty-Six and 85/100 ($11,326.85) Dollars, with interest from the said 23rd day of December, 1920, the date of the aforesaid explosion, with surety according to the rules and practice of this Court; and it is further

Ordered that any party may apply to have the amount of the stipulation so increased or diminished, as the case may be, on report of the commission appointed to appraise the amount of the petitioner's interest in the said barge "Bolikow" and her pending freight, in any or on the ultimate determination of the Court and exceptions to the Commissioner's report.

J. C. Hutcheson, Jr., U. S. D. J.

[File endorsement omitted.]

[fol. 82] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORIGINAL AD INTERIM STIPULATION—Filed Oct. 11, 1921

Whereas, the National Oil Transport Company has commenced a a proceeding in the United States District Court for the Southern District of Texas for limitation of its liability and exemption of liability as owner of the barge "Bolikow" in respect to an accident or disaster that occurred on the 23rd of December, 1920, and

Whereas, the petitioner, said National Oil Transport Company desires in pursuance of said petition that a monition issue out of this Court and all persons claiming any damages for any or all loss damages or injury caused by or resulting from said disaster citing them to appear before a commissioner of this Court, and make due proof of their respective claims at or before a given time to be fixed by the writ; and also to appear and answer the allegations of said petition according to the rules and practice of this Court and further that an injunction issue, restraining the commencement or prosecution of any and all suits, actions or legal proceedings [fol. 83] of any nature or description whatever, except in the present proceedings against the petitioner herein or the said barge "Bolikow" or her owners, in respect to any claim or claims arising out of the aforesaid disaster; and

Whereas an order was made and entered in this Court on the 13th day of October, 1921, fixing the petitioner's maximum interest in the said barge "Bolikow" and her pending freight, if any, as of the time immediately following the said disaster in the sum of Eleven Thousand Three Hundred Twenty six and 85/100 ($11,326.85) Dollars, for the purpose of this proceeding and subject to the rights of any party or interest for reappraisal of the said barge "Bolikow," or the pending freight thereof.

Now therefore, the petitioner, said National Oil Transport Company as principal and Hartford Accident & Indemnity Co., as surety in consideration of the premises and for other good and valuable considerations undertake in the sum of Eleven Thousand Three Hundred Twenty Six and 85/100 ($11,326.85) Dollars, with six per cent (6%) interest thereon from December 23, 1920, that the said National Oil Transport Company, petitioner herein, will file a bond or stipulation in the said proceeding for the limitation of its liability as owner of the said barge "Bolikow," executed in due form of law for the value of the petitioner's interest in the said barge "Bolikow" and her pending freight with six per cent (6%) interest thereon from December 23, 1920, within ten days after such values shall have been determined by appropriate proceedings in the said Court, and order fixing such value shall have been entered herein [fol. 84] and that pending the filing of such bond or stipulation as

aforesaid this undertaking shall stand as security for all claims in the said limitation proceeding.

Dated October 13, 1921.

National Oil Transport Company, by R. J. Barry, Vice-Pres.
Hartford Accident and Indemnity Company, Jas. P. Houstoun, Attorney in Fact, Surety. (Seal.)

App'd. J. C. Hutcheson, Jr., Judge.

[File endorsement omitted.]

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORIGINAL ORDER FOR PROOF OF CLAIM, ISSUANCE OF MONITION, AND INJUNCTION—Filed Oct. 14, 1921

A petition having been filed herein on the tenth day of October, 1921, by the National Oil Transport Company, as owner of the oil tank barge "Bolikow," her tackle, apparel, etc., claiming benefit of the limitation of liability provided for by the Third and Fourth Sections of an Act of Congress entitled: "An Act to Limit the Liability of Ship Owners and for other purposes," passed March 3, 1851, now embodied in Sections 4283-4284-4285 of the Revised Statutes and [fol. 86] Statutes supplemental thereto and amendatory thereof, and also contesting liability independently of the limitation of liability claimed under said Acts for any loss, damage or injury resulting from an explosion on the said oil tank barge "Bolikow" on the 23rd day of December, 1920, at Pier A of the Southern Pacific Docks in the City of Galveston, State of Texas, and the subsequent burning and wreckage thereof or any other claims arising out of or in connection with the said explosion on said barge and the said burning and wreckage thereof; and said petition also stating the facts and circumstances on which said exemption from and limitation of liability are claimed; and upon reading and filing the affidavit of W. Hyland verified the 22nd day of September, 1921, as to the value of the said barge "Bolikow" and the affidavit of R. J. Barry verified the 26th day of September, 1921, certifying that since the said disaster no part or portion of the said barge "Bolikow" has been saved or salved except the bare burned hulk thereof and that said hulk of Barge "Bolikow" which was sold at auction for the sum of Two Hundred Fifty ($250.00) Dollars and that her pending freight did not exceed the sum of Eleven Thousand, Seventy Six and 85/100 ($11,076.85) Dollars; and the ad interim stipulation for value executed the 13th day of October, 1921, in the sum of Eleven Thousand Three Hundred Twenty Six and 85/100 ($11,326.85) Dollars filed herein on the 13th day of October, 1921, undertaking to pay into Court within ten days after the entry of the order confirming the

report of the Commissioner to be appointed to appraise the value of the petitioner's interest in the said barge "Bolikow," her tackle, apparel, etc., and her pending freight and the amount of value of said [fol. 87] interest as thus ascertained, or to file in this proceeding a bond or stipulation of value in the usual form with surety in said amount, and that pending the payment into Court of the amount of the value of the petitioner's interest in said barge "Bolikow" and her pending freight, if any, so ascertained or the giving of a stipulation of the value thereof that said bond should stand as security for all claims in said limitation proceedings.

Now, on motion of Harrington, Bigham & Englar and Andrews Streetman Logue & Mobley, proctors for petitioner, it is

Ordered that a monition issue out of and under the seal of this Court against all persons claiming damages for any and all loss, damage or injury occasioned by or resulting from the aforesaid explosion on the said barge "Bolikow" and the subsequent burning of said barge "Bolikow" or in any other way resulting from the said disaster to the said barge "Bolikow" on or about the 23rd day of December, 1920, citing them to appear before this Court and make proof of their respective claims on or before the 31st day of December, 1921, at 10:30 o'clock in the forenoon; and Leo C. Brady, Esq., is hereby appointed commissioner before whom proofs of claim shall be presented in pursuance of said monition, subject to the right of any person to controvert or question the same, with liberty also to any person or persons claiming damages as aforesaid who shall have presented his or their claims to said commissioner under oath to answer said petition and it is further

Ordered, that public notice of said monition be published in the Galveston News, a newspaper published in the said city of Galves- [fol. 88] ton in the State of Texas three (3) times, the first publication to be at least sixty days before the return day of said monition and the last publication to be at least fourteen days before such return day; and that a copy of said monition be served on the respective attorneys or proctors of all persons, who, at the time of the making of this order shall have filed claims against the petitioner for damage or loss or injury occasioned by or arising out of the aforesaid disaster as hereinbefore, and in said petition herein, set forth together with a coy of this order, such last mentioned service to be made at least thirty days before the return day; and it is further

Ordered, that the beginning or prosecution of any or all suits, actions or legal proceedings of any nature or description whatsoever against the said barge "Bolikow" or her owners at the time of the aforesaid disaster with respect to any claim arising out of or in connection with the said explosion on the said barge "Bolikow" or subsequent burning of the said barge "Bolikow" or in any other way arising out of the said disaster to the said barge "Bolikow" on or about the 23rd day of December, 1920, be and the same hereby are stayed and restrained until or awaiting the termination of this proceeding; and and, it is further

Ordered, that service of this order as a restaining order, be made within this district in the usual manner and in any other district by the United States Marshal for such district, delivering a certified copy of this order to the person or persons to be restrained or to their respective attorneys or proctors.

J. C. Hutcheson, Jr., U. S. D. J.

[fol. 89] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MONITION—Oct. 14, 1921

The President of the United States of America *and* the Marshal of the United States for the Southern District of Texas, Greeting:

Whereas, a petition was filed in the District Court of the Southern District of Texas, on the tenth day of October, 1921, by the National Oil Transport Company, a foreign corporation organized and existing under and by virtue of the laws of the State of Maine, praying for a limitation of its liability as owner of the oil tank barge "Bolikow" concerning the loss, damage, injury and destruction occasioned by or resulting from the explosion of the said barge "Bolikow" on the 23rd of December, 1920, at Pier A of the Southern Pacific Docks in the city of Galveston, State of Texas, and the subsequent burning of said barge "Bolikow" at said time and place and any other loss or damage occasioned by or arising out of the said disaster to the said barge "Bolikow" on or about the 23rd day of December, 1920, for the reasons mentioned in said petition; and praying that a monition issue out of the said Court citing all persons claiming damages [fol. 90] for any or all loss, damage, or injury arising therefrom, to appear before said Court and make due proof of their respective claims and answer the allegations of said petition and if it should appear that the petitioner is not liable for any such loss, damage or injury, it may be so finally decreed by this Court; and

Whereas, on the 13th day of October, 1921, this Court has directed that upon the filing of stipulation for value in the sum of Eleven Thousand Three Hundred Twenty six and 85/100 Dollars ($11,326.85) with good and sufficient surety, a monition issue out of and under the seal of this Court against the persons claiming damages for any or all losses, damages or injuries occasioned by or resulting from the aforesaid occurrences or any of them, on or about said 23rd day of December, 1920, citing them to appear before this Court and make due proof of their respective claims on or before the 31st day of December, 1921, at 10:30 o'clock in the forenoon, and appointing Leo C. Brady, Esq., as commissioner before whom proof of claims, which shall be presented in pursuance of said monition, shall be made subject to the right of any person to controvert; and

Whereas, on the 13th day of October, 1921, the petitioner duly filed with the Clerk of this Court a stipulation for value in the sum of $11,326.85, undertaking to pay said sum on the entry of final decree made by this Court, or any Appellate Court, if an appeal intervene, with interest from the 23rd day of December, 1920.

You are therefore commanded to cite all persons claiming such damage for any such loss, damage, injury or destruction occasioned [fol. 91] by the said explosion on the said barge 'Bolikow" and the subsequent burning thereof at said City of Galveston, State of Texas, or in any other way arising out of or connected with said disaster, to appear before said Court and make due proof of their respective claims before Leo C. Brady, Esq., commissioner at his office American National Insurance Building in the city of Galveston, State of Texas, on or before the 31st day of December, 1921, at 10:30 o'clock in the forenoon; and you are also commanded to cite such claimants to appear and to answer the petition herein on or before the last named day or within such future time as the said Court may grant and to have and receive such relief as may be due; and that notice be given and published as provided in said order of the Court dated October 13, 1921.

And what you have done in the premises do you then make return to this Court, together with this monition.

Witness, the Honorable Joseph C. Hutcheson, Jr., Judge of the District Court in the Southern District of Texas on the 14th day of October in the year 1921 and of the Independence of the United States 146th.

L. C. Masterson, Clerk U. S. District Court, S. D. T., by G. Predecki, Deputy. Harrington, Bigham & Englar, Number 64, Wall Street, Borough of Manhattan, City of New York. (Seal.)

[fol. 92] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE, WITH MARSHALL'S RETURN THEREON—Filed Nov. 17, 1921

Notice is given that the National Oil Transport Company, owner of the oil tank barge "Bolikow" has filed its petition for limitation of Liability for any loss, destruction, damage or injury from said vessel on or about the 23rd day of December, 1920.

Stipulated value of vessel and freight, Eleven Thousand Three Hundred Twenty Six and 85/100 ($11,326.85) Dollars.

All persons claiming damages because of such loss, destruction, damage or injury must prove their claims before Leo C. Brady, Esq., [fol. 93] Commissioner, American National Insurance Building,

Galveston, Texas, on or before the 31st day of December, 1921, or be defaulted.

R. A. Harvin, U. S. Marshal Southern District of Texas, by Frank P. Tiernan, Deputy.

Marshall's Return

Received this Notice on the 18th day of October, A. D. 1921 and executed the same at Galveston, Texas, by having the foregoing and attached notice published in the Galveston Daily News on the 19th and 26th days of October and the 2nd and 9th days of November in accordance with Monition in this cause.

R. A. Harvin, U. S. Marshal S. D. T., by Frank P. Tiernan, Deputy.

[File endorsement omitted.]

[fol. 94] IN UNITED STATES DISTRICT COURT

No. A. D. 1062

R. L. KILGORE et al.

vs.

S. S. — OCCIDENTE, Her Cargo, etc.

No. A. D. 1062

CHAS. CLARKE, as Owner of Steam Tug Gertrude, Intervener,

vs.

S. S. EL OCCIDENTE, Her Cargo, etc.

No. A. D. 1062

J. S. CHARPENTIER et al., Officers and Crew of Steam Tug Barwick, Interveners,

vs.

S. S. EL OCCIDENTE, Her Cargo, etc.

No. A. D. 1076

NATIONAL OIL TRANSPORT COMPANY, as Owner of Steam Tug Barwick, Libelant,

vs.

S. S. EL OCCIDENTE, Her Cargo, etc.,

and the Cross-libel of

SOUTHERN PACIFIC COMPANY

vs.

NATIONAL TRANSPORT COMPANY

No. A. D. 1093

J. J. DALEHITE et al., Officers and Crew of Steam Tug Messenger,

vs.

S. S. EL OCCIDENTE

[fol. 95] The Petition of SOUTHERN PACIFIC COMPANY in said Causes and Interventions Nos. A. D. 1062, A. D. 1076, and A. D. 1093,

vs.

NATIONAL OIL COMPANY

No. A. D. 1123

In the Matter of the Petition of NATIONAL OIL TRANSPORT COMPANY, as Owner of the Wooden Tank Barge -Bolikow-, Her Tackle, Apparel, etc., and Her Pending Freight, for Limitation of Liability.

Consolidated in Cause No. A. D. 1123

In the Matter of the Petition of NATIONAL OIL TRANSPORT COMPANY, as Owner of the Wooden Tank Barge "Bolikow," Her Tackle, Apparel, etc, and Her Pending Freight, for Limitation of Liability.

DECREE—Filed March 20, 1923

The above causes coming on to be heard upon their merits, and it appearing to the Court that all of said causes grew out and relate to an explosion and fire on board the oil tank barge "Bolikow" on December 23, 1920, and it appearing to the Court that Causes No. A. D. 1062, R. L. Kilgore et al. vs. S/S El Occidente, her cargo, etc.,

No. A. D. 1062—Chas. Clarke, as Owner of Steam Tug Gertrude, Intervener vs. S/S El Occidente, her cargo, etc.,

No. A. D. 1062—J. S. Charpentier et al—Officers and Crew of Steam Tug Barwick, Interveners vs. S/S El Occidente, her cargo, etc.;

No. A. D. 1076—National Oil Transport Company as Owner of [fol. 96] Steam Tug Barwick, Libelant vs. S/S El Occidente, her Cargo, etc., and Cross Libel of Southern Pacific Company vs. National Oil Transport Company;

No. A. D. 1093—J. J. Dalchite et al, Officers and Crew of Steam Messenger vs. S/S El Occidente; and

The Petition of Southern Pacific Company in said causes and interventions Nos. A. D. 1062, A. D. 1076, and A. D. 1093 vs. National Oil Company;

Were by this Court, by order duly entered on the 7th day of June A. D. 1921, consolidated and it appearing to the Court that all the issues concerning in all of said causes can best be heard and determined in one proceeding and that the said causes should be consolidated, it is ordered and decreed by the Court that all of said causes be and they are hereby consolidated under cause No. A. D. 1123, entitled In the matter of the Petition of National Oil Transport Company, as Owner of the Wooden Tank Barge -Bolikow-, her tackle, apparel, etc., and her pending freight, for Limitation of Liability, and the Court having heard the evidence and arguments of the advocates for the respective parties in said causes, and being fully advised and informed as to the law, is of the opinion:

First. That the Petition of National Oil Transport Company for limitation of liability should be denied, the Court having found as appears from the opinion on file herein and now so finding that the explosion and fire on board the petitioner's vessel, the oil tank barge -Bolikow- set forth in the libel and petition of said National Oil [fol. 97] Transport Company as owner of said oil tank barge Bolikow, her tackle, apparel, etc., and her pending freight for limitation of liability, filed herein was due to the negligence of said petitioner, National Oil Transport Company and that the injuries and damages to the persons and property of others set forth in said petition and set forth in the claims filed with the Commissioner herein and reported to this Court were due to the fault and negligence of said petitioner and occurred with its privity and knowledge and it is so order, adjudged and decreed.

Second. And it appearing to the Court that the said petition of National Oil Transport Company for limitation of liability contested the liability of said petitioner on account of said explosion on said oil barge and denied that the same was due to any fault or negligence on the part of said vessel or its officers or crew, or to any fault or negligence of petitioner or any of its officers, agents or servants, and it further appearing to the Court that the following persons, to-wit: Voneata West for herself and as next friend Silvia West, James Westley West, Violet West and baby West, minors, John E. Fuertado, Maria Fadish, Ignacia Lizcano and Southern Pacific Company duly filed claims herein before Leo C. Brady, Commissioner heretofore appointed by this Court, who duly reported said claims into Court, and having filed said claims in due time filed answers herein contesting the right of petitioner to limitation of liability, and contesting the right of said petitioner to exemption from liability and the Court having heretofore by a separate decree entered herein disposed of said claims of Voneata West for her-

[fol. 98] self and as next friend of Silvia West, James Wesley West, Violet West and baby West, minors, John E. Fuertado, Maria Fadish and Ignacia Lizcano and the Court having heard the evidence upon the issues so made and the arguments of the advocates of the respective parties and being fully advised as to the law, is of the opinion that the said claimant-respondent Southern Pacific Company should recover on its claim the damages sustained by it, as alleged in said claim and the said claim and answer of the above named claimant-respondent and the issues made thereby, with reference to the amount of damages sustained by claimant-respondent Southern Pacific Company as alleged in said claim is referred to the Honorable Leo C. Brady, the Commissioner heretofore appointed in this cause, to take testimony and to review the evidence herein and to determine therefrom the amount of damages sustained by said claimant-respondent and to report the same into this Court with all convenient speed, and when said report is filed and when the same is finally approved by this Court, the Court will enter its final decree on said claim against the said National Oil Transport Company for the amount of its damages reported by said Commissioner and approved by the Court, and against the surety in the ad interim stipulation for value filed herein that the said surety within the time within which an appeal may be taken, cause the engagements of said stipulation to be performed, or show cause within four days after the expiration of said time for appeal why execution should not issue against its lands, chattels and goods.

Third. And the Court having heard the evidence upon the libel [fol. 99] of R. L. Kilgore, Thomas E. Taylor, Joseph Crawford, John Fisher, Gus Nelson, August Strasbing and William Hart, being the officers and crew of the steam tug Gertrude against the S/S El Occidente, her cargo, boilers, engines, tackle, apparel and furniture and against all persons lawfully intervening for their interest therein in a cause of salvage, civil and maritime in cause No. A. D. 1062, now consolidated herewith, and the answer of Southern Pacific Company, claimant of the S/S El Occidente thereto, and having heard the arguments of the advocates for the respective parties and being advised as to the law applicable to said issues, the Court is of the opinion that the said libelants R. L. Kilgore, Thomas E. Taylor, Joseph Crawford, John Fisher, Gus Nelson, August Strasbing and William Hart rendered salvage services to the S/S El Occidente as alleged in said libel, and are entitled to recover from the respondent Southern Pacific Company a salvage award for the performance of said services, and it is ordered, adjudged and decreed by the Court and the said libelants recover of the respondent Southern Pacific Company the sum of $7,500.00 for their services as salvors in the libel set forth, together with costs, and it is adjudged and decreed by the Court that the said sum of $7,500.00 be distributed as follows:

R. L. Kilgore, Captain	$1,672.70
Thomas E. Taylor, Chief Engineer	1,533.50
Joseph Crawford, Fireman	613.40

John Fisher, Fireman	613.40
Gus Nelson, Seaman	1,226.80
August Strasbing, Seaman	1,226.80
William Hart, Cook	613.40

[fol. 100] And the Court having heard the evidence upon the intervening libel of Chas. Clarke, owner of the steam tug Gertrude against the S/S El Occidente her cargo, boilers, engines, tackle, apparel and furniture and against all persons lawfully intervening for their interest in a cause of salvage civil and maritime, and the answer of the Southern Pacific Company, claimant of the S/S El Occidente filed in cause No. A. D. 1062 ,now consolidated herewith, and having heard the arguments of the advocates, for the respective parties and being advised as to the law applicable to said issues, the Court is of the opinion that the said intervening libelant Chas. Clarke is the owner of the said steam tug Gertrude and that the said steam tug Gertrude rendered salvage services to the S/S El Occidente as alleged in said libel and that the said Chas. Clarke as owner of the said steam tug Gertrude is entitled to recover from respondent Southern Pacific Company a salvage award for the performance of said services and it is ordered, adjudged and decreed by the Court that the said libelant Chas. Clarke recover of the respondent Southern Pacific Company the sum of $7,500.00 for the services of said steam tug Gertrude as set forth in the intervening libel, together with costs; and the Court having heard the evidence upon the intervening libel of J. S. Charpentier, James H. Clarke, Art Allen, August Greenbaum, J. D. Griffin, Felix Campbell, A. Nienne, Burt Chassen, Roy Bingeman, John King, Frank Angeles, Jack Wilkerson and F. R. Guesenberry, being the officers and seaman of the steam tug Barwick against the S/S El Occidente, her cargo, boilers, engines, tackle, apparel and furniture and against all persons lawfully intervening for their interest therein in a cause of salvage, civil and maritime and the answer [fol. 101] of Southern Pacific Company claimant of the S/S El Occidente, to said intervening libel filed in cause No. A. D. 1062 now consolidated herewith and having heard the arguments of the advocates for the respective parties and being advised as to law, the Court is of the opinion that the said libelants J. S. Charpentier, James H. Clarke, Art Allen, August Greenbaum, J. D. Griffin, Felix Campbell, A. Nienne, Burt Chassen, Roy Bingeman, John King, Frank Angeles, Jack Wilkerson and F. R. Quesenberry, rendered salvage services to the said S/S El Occidente, as alleged in said libel and are entitled to recover from the respondent Southern Pacific Company a salvage award for said salvage services and it is ordered, adjudged and decreed by the Court that the libelants recover of the said respondent Southern Pacific Company the sum of $12,500.00 for said services as salvors, as in said intervening libel set forth, together with costs, and it is ordered, adjudged and decreed that the said sum of $12,500.00 be distributed among the said intervening libelants in proportion to their wages, to be ascertained and fixed by agreement or in default thereof by reference to the Commissioner.

Fourth. And the Court having heard the evidence upon the libel of National Oil Transport Company as owner of the steam tug Barwick, against the S/S El Occidente her engines, boilers, cargo and freight, in a cause of action civil and maritime; and the answer of the Southern Pacific Company, claimant of the S/S El Occidente, filed in cause No. A. D. 1076, now consolidated herewith, and having heard the arguments of the advocates for the respective parties and being advised as to the law, applicable to the issues made by the plead- [fol. 102] ings, the Court is of the opinion that though the services of the steam tug Barwick were meritorious and efficient, the said libelant National Oil Transport Company is not entitled as a matter of law, to recover for the salvage services of said steam tug Barwick, because of its fault as herein found, and the said libel is dismissed and it is ordered, adjudged and decreed that the costs of said proceeding be paid by the said libelant and the Court having heard the cross-libel of the Southern Pacific Company filed in said cause No. A. D. 1076 against National Oil Transport Company for damages and it appearing to the Court that the said cross-libel alleges and asserts a cause of action against the said National Oil Transport Company, libelant, identical with the cause of action for damages alleged and asserted by it in its claim and answer filed in cause No. A. D. 1123, entitled In the matter of the Petition of National Oil Transport Company as Owner of the Wooden Tank Barge Bolikow, her tackle, apparel, etc., and her pending freight, for Limitation of Liability, now consolidated with the above-named causes, and that the Court has decreed in favor of the said cross-libelant Southern Pacific Company on said claims and answers as above set forth in the second paragraph of this decree, and the said cross-libel of Southern Pacific Company is dismissed without prejudice to the decrees herein entered on the claim of said cross-libelant for damages and the costs thereof are ordered and decreed to be paid by National Oil Transport Company.

Fifth. And the Court having heard the evidence upon the libel of J. J. Dalehite, William D. Sweeney, Vernon Kemmelden, Paul Williams, Harry Hanson and C. Christofferson, officers and crew of [fol 103] the tug boat Messenger, against the S. S. El Occidente, her tackle, apparel, furniture, etc., and against all persons lawfully intervening for their interests filed in cause A. D. 1093, entitled J. J. Dalehite et al. vs. S. S. El Occidente, now consolidated herewith, and the answer of Southern Pacific Company, claimant of the S. S. El Occidente, and having heard the arguments of the advocates for the respective parties and being advised as to the law, the Court is of the opinion that the said libelants J. J. Dalehite, William D. Sweeney, Vernon Kemmelden, Paul Williams, Harry Hanson, and C. Christofferson rendered salvage services to the S. S. El Occidente as alleged in said libel and are entitled to recover from the respondent Southern Pacific Company a salvage award for the performance of said services, and it is ordered, adjudged and decreed by the Court that the said libelants recover of the respondent Southern Pacific Company the sum of $3,750.00 for their services as salvors as in the libel set forth,

together with costs, and it is ordered, adjudged and decreed that the said sum of $3,750.00 be distributed among the said salvors in proportion to their wages.

Sixth. And the Court having considered the petition of Southern Pacific Company under general admiralty rule 56, filed in causes Nos. A. D. 1062, A. D. 1076 and A. D. 1093 against the National Oil Company and having heard the evidence in respect thereto and it appearing to the Court that the cause of action against the said National Oil Company asserted in said petition upon the lease contract therein set forth between the National Oil Company and Southern Pacific Terminal Company is not of maritime cognizance, and [fol. 104] that therefore this Court has no jurisdiction to determine the same and the said petition insofar as it asserts a cause of action founded upon said alleged contract of lease is dismissed for want of jurisdiction but without prejudice to the right of said Southern Pacific Company to institute any suit or suits at law in this or any other Court upon said lease contract; and as to the other causes of action set forth in said petition against the said National Oil Company, the Court having heard the evidence adduced by both parties and the arguments of the advocates for said parties is of the opinion and so finds, that the petitioner is not entitled to recover upon said petition against said National Oil Company and it is ordered, adjudged and decreed that said petition be and it is hereby dismissed.

Seventh. It is ordered by the Court that the costs of taking, returning and filing all depositions in all of said causes consolidated herewith and all costs of the trial of this consolidated cause be taxed herein and recovered from petitioner National Oil Transport Company. It is further ordered that the libelants R. L. Kilgore, Thomas E. Taylor, Joseph Crawford, John Fisher, Gus Nelson, August Strasbing and William Hart in cause No. A. D. 1062, recover from Southern Pacific Company, respondent in said cause, their costs in said behalf expended to be taxed and that the said Southern Pacific Company recover the same from the said petitioner National Oil Transport Company. It is further ordered that the intervening libelant Chas. Clarke recover from the Southern Pacific Company his costs expended in cause No. A. D. 1062 to be taxed and that the [fol. 105] Southern Pacific Company recover the said costs from the said petitioner National Oil Transport Company. It is further ordered that the intervening libelants J. S. Charpentier, James H. Clarke, Art Allen, August Greenbaum, J. D. Griffin, Felix Campbell, A. Nienne, Burt Chasen, Roy Bingeman, John Kink, Frank Angeles, Jack Wilkerson and F. R. Quesenberry in cause No. A. D. 1062, recover from Southern Pacific Company respondent in said cause, their costs in said behalf expended to be taxed, and that the said Southern Pacific Company recover the same from the said petitioner National Oil Transport Company. It is further ordered that the libelants J. J. Dalchite, William D. Sweeney, Vernon Kemmelden, Paul Williams, Harry Hanson and C. Christofferson recover from Southern Pacific Company their costs expended in cause No.

A. D. 1093 to be taxed, and that Southern Pacific Company recover said costs from said petitioner National Oil Transport Company. It is further ordered that the claimant-respondent Southern Pacific Company recover its costs expended in cause No. A. D. 1076 from the petitioner National Oil Transport Company to be taxed. It is further ordered by the Court that the claimant-respondent Southern Pacific Company recover from petitioner National Oil Transport Company its costs expended on its cross-libel in said cause No. 1076 A. D. It is further ordered by the Court that National Oil Company recover from petitioner Southern Pacific Company its costs incurred in answering and defending the petition of said Southern Pacific Company filed in causes Nos. A. D. 1062, A. D. 1076 and A. D. 1093 against said National Oil Company. It is further ordered by the Court that the Southern Pacific Company recover of the petitioner National Oil Transport Company its costs expended in causes Nos. A. D. 1062, A. D. 1093 and A. D. 1123. To which decree Nat'l [fols. 106 & 107] Oil Transport Company excepts.

J. C. Hutcheson, Jr., Judge.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Motion of Claimant-Respondent Southern Pacific Company for Entrance of Final Decree—Filed Aug. 17, 1923

[fol. 108] Now comes the claimant-respondent, Southern Pacific Company and moves the Court to enter decree herein as per the form of decree attached.

Terry, Cavin & Mills, W. T. Armstrong, W. E. Cranford, Attorneys for Claimant-Respondent Southern Pacific Company.

[fol. 109] Form of Decree

This cause having been heard upon the pleadings of the party petitioner herein and of the claimants answering said petition and the proofs of the respective parties and the interlocutory decree as to the claim of the claimant-respondent, Southern Pacific Company, having been entered herein on the 20th day of March, A. D. 1923, whereby it was referred to Leo C. Brady, Commissioner of this Court, to take testimony and to review the evidence herein and to determine therefrom the amount of damages sustained by said [fol. 110] claimant-respondent and report the same unto this Court with all convenient speed:

And the report of said Commissioner having been filed herein and the time for filing of exceptions having expired and no exceptions

to said Commissioner's report having been filed herein and the Court having examined and directed confirmation of said report, now on motion for the said claimant-respondent, it is ordered, adjudged and decreed:

First: That the report of said Commissioner be and it is hereby in all things confirmed and approved;

Second. That the claimant-respondent, Southern Pacific Company, do have and recover of and from the petitioner, National Oil Transport Company, the sum of $279,797.37, being the total amount of damages sustained by said claimant-respondent, found by said Commission—and reported herein, and it is further ordered, adjudged and decreed that the said claimant-respondent, Southern Pacific Company, do recover over against the petitioner, National Oil Transport Company, the sum of $31,250.00, the total amount of the salvage awards herein decreed against the said claimant-respondent, Southern Pacific Company;

Third. And it appearing to the Court that the petitioner, National Oil Transport Company, did on the 14th day of October, 1921, file herein and present to this Court the affidavit of R. J. Barry, Vice-president of the petitioner company, making oath and declaring the value of the said Barge "Bolikow" after she was burned as the result [fol.111] of the explosion thereon on December 23rd, 1920, the occurrence in respect to which the petitioner prays for a decree of limitation of liability and for exemption from liability and did on the same date file and present a like affidavit of W. Hyland, District Manager of the petitioner company, each making oath and declaring the value of said barge immediately after said occurrence to be $250.00 for which sum it was sold at auction, and that at the end of the voyage of said barge "Bolikow" which terminated with the said explosion and the said burning of said barge, the amount of her pending freight at the end of the voyage was not in excess of $11,076.85 and did present to this Court its stipulation for the value of said barge and pending freight with Hartford Accident & Indemnity Company, as co-stipulator and surety thereon, in the sum of $11,326.85 with 6% interest thereon from December 23rd, 1920, the date of said explosion and fire and undertaking to file in this proceeding a bond or stipulation for the value of the petitioner's interest in said barge "Bolikow" and her pending freight, with 6% interest thereon from December 23rd, 1920, within ten days after the determination of such value by appropriate proceedings an order fixing such value entered herein and that pending the filing of such bond or stipulation said undertaking will stand as security for all claims in the said limitation proceedings;

And it further appearing to the Court that said bond was accepted and approved by this Court in said sum as being for the value of the petitioner's maximum interest in said Barge and her pending freight for the purpose of this proceeding and did fix the value of said barge and pending freight for such purpose in the said sum of $11,326.85, subject to the rights of any party or interest for re-appraisal of the

[fol. 112] said barge "Bolikow" or her pending freight and that thereupon this Court ordered monition to be issued and published in due form against all persons claiming damage for any and all loss, damage or injury occasioned by or resulting from the aforesaid explosion of the said barge "Bolikow" and the subsequent burning of said barge, or in any other way resulting from said disaster, and citing them to appear before this Court and make proof of their respective claims, and did make an order staying and restraining the beginning or prosecution of any or all suits, actions or legal proceedings of any nature or description whatsoever against said barge or her owners at the time of the aforesaid disaster, with respect to any such claim or claims and that said monition was thereupon issued and published in due form and these proceedings had:

And it further appearing to the Court that neither the petitioner nor its stipulator nor any other party or interest has moved for or caused any re-appraisal or appraisal of the petitioner's interest in said barge and her pending freight, or either of them or caused any order to be entered by the Court fixing such value except as was done by the approval and filing of said ad inderum (interum) stipulation as aforesaid and the issuance and publication of a monition thereon as aforesaid, and it further appearing to the Court that no bond for value other than said ad inderum (interim) stipulation has been filed herein by the petitioner and it appearing from the evidence introduced on the trial hereof and the Court here and now finding that the value of petitioners interest in said barge at the termination of her voyage is $250.00 and that the value of the petitioner's interest in the pending freight of said barge at the termination of said [fol. 113] voyage is $11,076.85, and that the total value of said petitioner's interest in said barge and her pending freight at the termination of her said voyage is $11,326.85; it is, therefore, ordered and decreed that unless this decree be satisfied or an appeal be taken therefrom within the time limited by law and the rules and practice of this Court, the stipulator for value will cause the said petitioner to pay into Court the sum of $11,326.85, the amount of the value of the petitioner's interest in the said barge and her pending freight at the termination of her said voyage, with 6% interest from December 23rd, 1920, to be applied in payment of the costs of Court, the remainder to be pro-rated among the respective claimant-respondents in proportion to the amounts of the decrees entered in their favor herein, or show cause why execution should not issue therefor, against goods, chattels and lands of the stipulator for value.

It is ordered by the Court that the said amount of money stipulated for in said bond for value when same shall have been paid into Court or recovered under execution be first applied to the payment of all Court costs according to the decrees herein entered, and that the portion of same remaining, if any, be distributed among the claimant-respondents awarded decrees herein, prorated according to the amounts of the respective decrees.

—— ——, Judge.

[File endorsement omitted.]

[fol. 114] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR DISMISSAL BY SURETY ON LIMITATION OF LIABILITY BOND HARTFORD ACCIDENT AND INDEMNITY COMPANY—Filed August 18, 1923

Now comes Hartford Accident and Indemnity Company and respectfully shows to the Court that it is the surety on the bond of the petitioner herein which is an ad interim stipulation.

That it opposes the entry of a decree against it as prayed for by the claimant Southern Pacific Company for this:

(a) That said stipulation only provides that the principal therein, the National Oil & Transport Company, shall file a bond or stipulation within ten days after the value of petitioner's interest in the Barge -Bolikow- and her pending freight shall have been fixed and [fol. 115] that such values have never been determined by appropriate proceedings.

(b) That the condition of said ad interim stipulation only provides that it shall be in force pending the filing of such bond or stipulation as may become necessary for all claims in said limitation proceeding and that no such bond became necessary by reason of the fact that said limitation of liability was not granted by this Honorable Court but was denied and that no appeal has been taken from said decree so denying the limitation of liability.

(c) That the principal on said bond and the said Surety Company became liable on said bond only in the event limitation of liability had been granted to the petitioner herein and said petition for limitation of liability having been denied, said stipulation is of no further force or effect.

Wherefore, said Hartford Accident & Indemnity Company prays that no decree be entered against it and that it be dismissed from the above proceeding.

Williams & Neethe, for Surety.

[File endorsement omitted.]

[fol. 116] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed Dec. 4, 1923

I have given this matter very careful consideration and while it is not free from doubt on account of the fact that jurisdiction as finally exercised by the Court after denying the plea of limitation,

was largely permissive or by consent, in that the parties might have, when limitation was denied, demanded that the whole cause be dismissed, and therefore being permissive, it might be contended that the stipulators, who were no parties to the agreement to continue with the litigation, ought not to be bound by the permissive jurisdiction, yet I think the better view is, the stipulation not providing to the contrary, the stipulators ought to be held to abide the final outcome of the entire suit, irrespective of whether some steps in the proceeding have been made through permissive or consent jurisdiction.

I am strengthened in that view as to this particular case by the terms of the Ad Interim stipulation. This stipulation provides as follows:

"Now, therefore, the petitioner as principal and Hartford Accident [fol. 117] & Indemnity Co., as surety undertake in the sum of $11,326.85 that the said National Transport Co., petitioner herein, will file a bond or stipulation in the said proceeding for the limitation of its liability as owner of the said barge "Bolikow" executed in due form of law for the value of the petitioner's interest in said Barge "Bolikow" and her pending freight, etc., and that pending the filing of such bond or stipulation as aforesaid, this undertaking shall stand as security for all claims in the said limitation proceeding."

This language could not be made more clear, nor ought it to be qualified and limited by the Court as contended now by the stipulators. The bond was not filed and the stipulation is that until this bond was filed, this stipulation would stand for all claims in this proceeding.

Whatever might have been the construction which the Court would have placed upon the bond, if it had been given, the very terms of this instrument under construction obligated the stipulators to abide the judgment of this Court as to the claims and there is no qualification as to how that judgment should be reached.

Let an order be drawn fixing the liability of the stipulators and directing payment in accordance therewith.

J. C. Hutcheson, Jr., Judge.

[File endorsement omitted.]

[fol. 118] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE—Filed Dec. 17, 1923

[fol. 119] This cause having been heard upon the pleadings of the party petitioner herein and of the claimants answering said petition and the proofs of the respective parties and limitation of liability having been denied and an interlocutory decree as to the claim of the claimant-respondent Southern Pacific Company, having

been entered herein on the 20th day of March, A. D. 1923, whereby it was referred to Leo C. Brady, Commissioner of this Court to take testimony and to review the evidence herein and to determine therefrom the amount of damages sustained by said claimant-respondent and report the same unto this Court with all convenient speed:

And the report of said Commissioner having been filed herein and the time for filing of exceptions having expired and no excep-
[fol. 120] tions to said Commissioner's report having been filed herein, and the Court having examined and directed confirmation of said report, and the said claimant-respondent Southern Pacific Company, having filed its motion herein for the entry of a final decree in its favor against the said National Oil Transport Company and against the surety on the ad interim stipulation filed herein, that they cause the amount of said ad interim stipulation, namely the sum of $11,326.85 with 6% interest from December 23rd, 1920, to be paid into Court, or show cause why execution should not issue therefor against the goods, chattels and lands of the said stipulator, and the Hartford Accident & Indemnity Company, the stipulators on said bond having appeared by their attorneys Messrs. Williams & Neethe and opposed the entrance of any decree against it as stipulators, on said bond and moved the Court that it be dismissed from this proceeding, and the Court having heard the said opposition and motion to be dismissed, and having overruled the same, now, on motion for the said claimant-respondent, it is ordered, adjudged and decreed:

First. That the report of said Commissioner be and it is hereby in all things confirmed and approved.

Second. That the claimant-respondent, Southern Pacific Company, do have and recover of and from the petitioner National Oil Transport Company the sum of $279,797.37, being the total amount of damages sustained by said claimant-respondent, found by said Commissioner and reported herein and it is further ordered, adjudged and decreed that the said claimant-respondent Southern Pacific Company do recover over against the petitioner National Oil
[fol. 121] Transport Company, the sum of $31,250.00 the total amount of the salvage awards herein decreed against the said claimant-respondent Southern Pacific Company;

Third. And it appearing to the Court that the petitioner, National Oil Transport Company, did, on the 14th day of October, 1921, filed herein and present to this Court the affidavit of R. J. Barry-Vice-president of the petitioner company, making oath and declaring the value of the Barge "Bolikow" after she was burned as the result of the explosion thereon on December 23rd, 1920, the occurrence in respect to which the petitioner prays for a decree of limitation of liability and for exemption from liability, and did on the same date file and present a like affidavit of W. Hyland, District Manager of the petitioner company, each making oath and declaring the value of said barge immediately after said occurrence to be

$250.00, for which sum it was sold at auction and that at the end of the voyage of said Barge "Bolikow" which terminated with the said explosion and the said burning of said barge, the amount of her pending freight at the end of the voyage was not in excess of $11,076.85 and did present to this Court its stipulation for the value of said barge and pending freight with Hartford Accident & Indemnity Company as co-stipulator and surety thereon in the sum of $11,326.85 with 6% interest thereon from December 23rd, 1920, the date of said explosion and fire and undertaking to file in this proceeding a bond or stipulation for the value of the petitioner's interest in said Barge "Bolikow" and her pending freight, with 6% interest thereon from December 23rd, 1920 within ten days after the determination of such value by appropriate proceedings an order fixing such value entered herein and that [fol. 122] pending the filing of such bond or stipulation said undertaking will stand as security for all claims in the said limitation proceedings;

And it further appearing to the Court that said bond was accepted and approved by this Court in said sum as being for the value of the petitioner's maximum interest in said barge and her pending freight, for the purpose of this proceeding and did fix the value of said barge and pending freight for such purpose in the said sum of $11,326.85, subject to the rights of any party or interest for re-appraisal of the said Barge "Bolikow" or her pending freight, and that thereupon this Court ordered monition to be issued and published in due form against all persons claiming damages for any and all loss, damage or injury occasioned by or resulting from the aforesaid explosion of the said Barge "Bolikow" and the subsequent burning of said Barge, or in any other way resulting from said disaster, and citing them to appear before this Court and make proof of their respective claims, and did make an order staying and restraining the beginning or prosecution of any or all suits, actions or legal proceedings of any nature or description whatsoever against said barge or her owners at the time of the aforesaid disaster, with respect to any such claim or claims, and that said monition was thereupon issued and published in due from, and these proceedings had;

And it further appearing to the Court that neither the petitioner nor its stipulator nor any other party or interest has moved for or caused any re-appraisal or appraisal of the petitioner's interest in said barge and her pending freight, or either of them or caused any order to be entered by the Court fixing such value except as was done by the approval and filing of said ad interim stipulation [fol. 123] as aforesaid and the issuance and publication of a monition thereon as aforesaid, and it further appearing to the Court that no bond for value other than said ad interim stipulation has been filed herein by the petitioner and it appearing from the evidence introduced on the trial hereof and the Court here and now finding that the value of the petitioner's interest in said barge at the termination of her voyage is $250.00, and that the value of the petitioner's interest in the pending freight of said barge at the termina-

tion of said voyage is $11,076.85 and that the total value of said petitioner's interest in said barge and her pending freight at the termination of her said voyage is $11,326.85; It is therefore, ordered and decreed that unless this decree be satisfied or an appeal be taken therefrom within the time limited by law and the rules and practice of this Court, the stipulator for value will cause the said petitioner to pay into Court the sum of $11,326.85, the amount of the value of the petitioner's interest in the said barge and her pending freight at the termination of her said voyage, with 6% interest from December 23rd, 1920, to be applied in payment of the costs of Court the remainder to be pro-rated among the respective claimant-respondents in proportion to the amounts of the decrees entered in their favor herein or show cause why execution should not issue therefor against goods chattels and lands of the stipulator for value.

It is ordered by the Court that the said amount of money stipulated for in said bond for value when same shall have been paid into Court, or recovered under execution be first applied to the payment of all Court costs, according to the decrees herein entered and that the portion of same remaining, if any, be distributed among the claimant-respondents awarded decrees herein, pro-rated [fol. 124] according to the amounts of the respective decrees, to all of which the Hartford Accident and Indemnity Co., the surety on the bond of petitioner herein, excepts in so far as this decree holds said surety liable, and National Oil Transport Company excepts to all decrees and recoveries allowed against it either in this decree or in said interlocutory decree of March 20, 1923, which is hereby made final.

J. C. Hutcheson, Jr., Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Febuary 4th, 1924

1. The Court erred in holding the Hartford Accident & Indemnity Company of Hartford, Connecticut, surety, was liable on its undertaking.

[fol. 125] 2. The Court erred in holding the surety liable on its stipulation for value, because such stipulation only provides that the National Oil Transport Company shall file a bond or stipulation within ten days after the value of the petitioner's interest in the barge Bolikow and her pending freight shall have been fixed, and such values have never been determined by appropriate proceedings.

3. The Court erred in holding the surety liable on its stipulation for value, because the condition of the ad interim stipulation only

provided that it shall be in force pending the filing of such bond or stipulation as may become necessary for all claims in said limitation proceedings, and no such bond became necessary because the petition for limitation of liability was denied to the petitioner, for whose account said stipulation for value was given, and no appeal has been taken from the decree so denying the limitation of liability and the time so to do has long since expired.

4. The Court erred in holding the surety liable because the principal on said stipulation for value and the surety thereon became liable only in the event limitation of liability shall have been granted to the petitioner, and said petition for limitation of liability having been denied, such stipulation is of no further force and effect.

Williams & Neethe, Proctors for Appellant.

[File endorsement omitted.]

[fol. 126] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed February 4th, 1924

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

The petition of the Hartford Accident & Indemnity Company of Hartford, Connecticut, surety on the stipulation for value in the petition in the above entitled and numbered proceeding, which is a proceeding for limitation of liability, represents that there is error in the decree entered in said cause on the 4th day of December, 1923, by said Court, and which holds said surety liable for the amount of said bond and which is error to manifest, prejudice and injury of said surety, and from which decree it desires to appeal for the purpose of having said error corrected, as assigned and set forth in the assignment of errors filed herein, as required by law.

[fol. 127] Wherefore, said surety prays this Honorable Court to allow it an appeal from said final decree in the United States Circuit Court of Appeals for the Fifth Circuit, returnable according to law, and that the National Oil & Transport Company and the Southern Pacific Company, appellees herein, may be cited to answer said appeal.

Williams & Neethe, Proctors for Appellant.

February 1st, 1924.

Upon the foregoing petition, and upon reading and filing of the assignment of errors, and filing of a bond by the Hartford Accident & Indemnity Company in the sum of $20,000.00, on which said bond a surety has been waived by the parties adversely interested, the foregoing appeal of the Surety Company is allowed and granted, said

appeal to be returnable in the Circuit Court of Appeals for the Fifth Judicial District within thirty days from the date of this order.

J. C. Hutcheson, Jr., Judge United States District Court, Southern District of Texas.

[File endorsement omitted.]

[fols. 128-130] Bond on Appeal for $20,250—Approved and filed Feb. 4, 1924; omitted in printing

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[fol. 131] In United States District Court

Clerk's Certificate

I, L. C. Masterson, Clerk of the District Court of the United States, for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, assignment of errors, and all proceedings in the case, as called for in the Præcipe for Transcript, on pages 1 and 2 of said Transcript, in cause No. 1123 on the Admiralty Docket of said Court, entitled In the Matter of the Petition of National Oil Transport Company, as Owner of the Wooden Oil Tank Barge "Bolikow", her Tackle, apparel, etc., and Pending Freight, in a cause of Limitation of Liability, as the same now appears on file and of record in my office.

To certify which, witness my hand and the seal of said Court at Galveston, in said District, this the 7th day of February, A. D. 1924.

L. C. Masterson, Clerk United States District Court, Southern District of Texas, by M. Anderson, Deputy. (Seal.)

Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 132] In United States Circuit Court of Appeals

No. 4295

Hartford Accident and Indemnity Company of Hartford

versus

Southern Pacific Company et al.

Argument and Submission—December 10, 1924

On this day this cause was called, and, after argument by John Neethe, Esq., for appellant, and W. E. Cranford, Esq., for appellee, was submitted to the Court.

[fol. 133] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

Appeal from the District Court of the United States for the Southern District of Texas

John Neethe (Williams, Neethe & Williams and John Neethe on the brief), for Appellant.

W. T. Armstrong and W. E. Cranford (Burlingham, Veeder, Master & Feary, Terry, Cavin & Mills, W. T. Armstrong, and W. E. Cranford on the brief), for Appellees.

Before Walker and Bryan, Circuit Judges, and Clayton, District Judge

OPINION—Filed January 6, 1925

WALKER, Circuit Judge:

The owner of the oil tank barge Bolikow filed its petition for a limitation of its liability in respect of claims arising out of an alleged explosive on and burning of that barge. That petition contained prayers to the following effect: That the court will cause due appraisement to be made of the amount of the value of petitioner's interest in said barge after said explosion and at the time of the cessation of the burning of said barge as the result of said explosion, [fol. 134] and make an order for the payment of such amount into court, "and granting leave to the petitioner to file an ad interim stipulation pending the appraisel of the petitioner's said interest in said barge Bolikow and her pending freight, if any;" that the court will issue a monition to all persons having claims for loss or damage caused by said explosion and burning to present and make proof of their claims in the proceeding instituted by the filing of said petition; and that the court issue an injunction restraining the commencement or prosecution, except in this proceeding, of any suit or action by the claimant named in the petition or any other person or persons who may have or claim to have any cause or causes of action against said barge or its owners arising out of said explosion or burning. Upon the presentation of the petition accompanied by an affidavit showing that the value of the burned hulk of said barge, which was all of the barge or its cargo that was saved or salved after such explosion and burning, was the sum of $250.00, and that the freight on said barge pending at the time of said disaster did not exceed the sum of $11,076.85, the court made the following order:

"Ordered that the petitioner file herein an ad interim stipulation for the value of said barge 'Bolikow,' her tackle, apparel, equipment, etc., with the maximum possible amount of the pending freight at the termination of the said fire on said barge 'Bolikow' and of the said

voyage on which said barge 'Bolikow' was engaged at the time of the said disaster in the sum of Eleven Thousand Three Hundred Twenty-six and 85/100 ($11,326.85) Dollars, with interest from the said 23rd day of December, 1920, the date of the aforesaid explosion, with surety according to the rules and practice of this Court; and it is further

Ordered that any party may apply to have the amount of the stipulation so increased or diminished, as the case may be, on report of the commission appointed to appraise the amount of the petitioner's interest in the said barge 'Bolikow' and her pending freight, if any, or on the ultimate determination of the Court and exceptions [fol. 135] to the Commissioner's report."

Pursuant to that order the petitioner and the appellant as surety executed an ad interim stipulation, which, following the recital of the making of that order, contained the following:

"Now, therefore, the petitioner, said National Oil Transport Company as principal and Hartford Accident & Indemnity Co., as surety in consideration of the premises and for other good and valuable considerations undertake in the sum of Eleven Thousand Three Hundred Twenty Six and 85/100 ($11,326.85) Dollars, with six per cent (6%) interest thereon from December 23, 1920, that the said National Oil Transport Company, petitioner herein, will file a bond or stipulation in the said proceeding for the limitation of its liability as owner of the said barge 'Bolikow,' executed in due form of law for the value of the petitioner's interest in the said barge 'Bolikow' and her pending freight with six per cent (6%) interest thereon from December 23, 1920, within ten days after such values shall have been determined by appropriate proceedings in the said Court, and order fixing such value shall have been entered herein and pending the filing of such bond or stipulation as aforesaid this undertaking shall stand as security for all claims in the said limitation proceeding."

After the filing of that instrument the court made an order which granted the above mentioned prayers of the petition as to the issuance of a monition and of an injunction. Thereafter, without any further action being applied for or taken by the court with reference to fixing the value of the barge or its pending freight, the cause proceeded to a final decree, which denied the petition for limitation of liability, and sustained, in whole or in part, claims asserted in that proceeding. That decree contained the following:

"And it further appearing to the Court that neither the petitioner nor its stipulator nor any other party or interest has moved for or caused any re-appraisal or appraisal of the petitioner's interest in said barge and her pending freight, or either of them or caused any order to be entered by the Court fixing such value except as was done by the approval and filing of said ad interim stipulation as aforesaid and the issuance and publication of a monition thereon as aforesaid, and it further appearing to the Court that no bond for value other than said ad interim stipulation has been filed herein by the pe-

titioner and it appearing from the evidence introduced on the trial [fol. 136] hereof and the Court here and now finding that the value of petitioner's interest in said barge at the termination of her voyage is $250.00 and that the value of the petitioner's interest in the pending freight of said barge at the termination of said voyage is $11,076.85, and that the total value of said petitioner's interest in said barge and her pending freight at the termination of her said voyage is $11,326.85; it is, therefore, ordered and decreed that unless this decree be satisfied or an appeal be taken therefrom within the time limited by law and the rules and practice of this Court, the stipulator for value will cause the said petitioner to pay into Court the sum of $11,326.85, the amount of the value of the petitioner's interest in the said barge and her pending freight at the termination of her said voyage, with 6% interest from December 23rd, 1920, to be applied in payment of the costs of Court, the remainder to be pro-rated among the respective claimant-respondents in proportion to the amounts of the decrees entered in their favor herein, or show cause why execution should not issue therefor, against goods, chattels and lands of the stipulator for value."

The appellant, the surety in the above mentioned ad interim stipulation, complains of the action of the court to the effect of requiring the appellant to pay into court the amount stated in that stipulation, with interest thereon, such amount to be applied to the payment of costs, the remainder to be prorated among the respective claimants in proportion to the amounts adjudged in their favor. In behalf of the appellant it is contended that the surety on a bond or stipulation in a proceeding for limitation of liability becomes liable only in the event limitation of liability is granted, and when that relief is denied, the bond or stipulation ceases to be effective; that, upon a denial of a limitation of liability, there ceases to be a res in court, and the proceeding ceases to be one in rem and becomes a proceeding in personam by claimants against the shipowner, the jurisdiction of the court thereafter being limited to the enforcement of asserted claims in personam against the shipowner.

The provisions of the statute and of the Admiralty Rules in reference to a limitation of liability proceeding do not disclose the [fol. 137] existence of an intention to give to a denial of the shipowner's asserted claim to a limitation of his liability the effect of a release of what has been brought into court by the shipowner to be subjected to claims allowed, or of converting the proceeding into one purely in personam against the shipowner for the enforcement of such claims. The statute (R. S. § 4285) provides for a transfer by the shipowner claiming a limitation of his liability of "his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto." The language of the quoted provision by no means indicates that it was contemplated that the transfer provided for

should be subject to the condition that it would cease to be effective upon a denial of the transferrer's asserted right to have what is transferred held to be solely and exclusively liable for the demands of the claimants for whose benefit the transfer is made. The language of the provision indicates that what was intended was an absolute and unconditional transfer by the shipowner of "his interest in such vessel and freight, for the benefit of such claimants." The transfer has the effect of an abandonment by the shipowner of the things transferred, with the result of making those things subject to be applied on the shipowner's liabilities,—to the claims against the ship or its owner which may be asserted in the proceeding. The City of Norwich, 118 U. S. 460, 503, 506. An effect of the statute is to make a shipowner's right to claim, in a proceeding in which claims against the ship or its owner are required to be asserted, the benefit of the provided for limitation of his liability, dependent upon a surrender by him for the benefit of the claimants of "the whole value of the [fol. 138] vessel and her freight for the voyage." R. S. § 4284, as amended February 27, 1877, 19 Stat. 251; O'Brien v. Miller, 168 U. S. 287, 303; The Great Western, 118 U. S. 520. The Admiralty Rules (51, 52, 53) governing such a proceeding provide for the giving of a stipulation with sufficient sureties or an approved corporate surety for the payment into court of the amount of the appraised value of the shipowner's interest in the vessel and its pending freight, with interest; for requiring the assertion in that proceeding of all claims based on the matters as to which the shipowner claims a limitation of his liability; for the application on allowed claims of the balance, left after paying of costs and expenses, of the money paid or ordered to be paid into court; for the contest by the shipowner of his, or his ship's, liability on claims asserted, and for the contest by claimants of the asserted right of the shipowner either to an exemption from liability or to a limitation of his liability under the statute. The provisions with reference to such a proceeding show that a denial therein of the shipowner's asserted right to a limitation of his liability was contemplated. Those provisions indicate the absence of any intention to give to such a denial the effect of dispensing with a compliance with the unconditional requirement as to subjecting to allowed claims moneys paid or ordered to be paid into court as aforesaid. The institution of such a proceeding involves an admission by the shipowner that if he is liable on claims required to be asserted therein what he brings into court is subject to that liability, whether the shipowner's asserted right to a limitation of his liability does or does not exist. As to claimants coming into the proceeding in response to the monition a purpose of the pro- [fol. 139] ceeding is to subject property in the custody of the court. We are not of opinion that the failure of a shipowner to sustain his contention that what he brings into court is solely and exclusively liable to claims required to be asserted in the proceeding can properly be given the effect of changing the nature of the proceeding so far as it is one for the enforcement of such claims or of ousting the court's jurisdiction to subject to allowed claims what was surrendered

to the court by the shipowner for the purpose of being subjected to those claims.

A stipulation for value given pursuant to Admiralty Rule 51 is a substitute for the vessel and its freight. In re Morrison, 147 U. S. 14. The order of the court under which the above mentioned ad interim stipulation was given entitled any party to the cause to hold the appellant responsible for a strict compliance with the provision of the Rule as to a stipulation for the appraised value of the vessel and its freight. It was open to the parties to the cause other than the shipowner to waive an appraisement, to acquiesce in the shipowner's statement as to the values of the vessel and its freight, and to treat the ad interim stipulation as a substitute for the vessel and its freight. The requirement of the decree that the appellant, the stipulator for value, cause its principal to pay into court the amount stated in the stipulation, with interest, was no more than the equivalent of what that instrument required. The same result would have been accomplished by requiring the filing of a bond or stipulation for the same amount, in strict compliance with the terms of the stipulation. What the court did in that regard amounted to the enforcement of security given and acquiesced in for the payment into court of the unquestioned amount of the value of the vessel and [fol. 140] its freight, with interest on that sum. The instrument which the appellant signed as surety had the effect of obligating it to bring about that result. It follows that the decree did not involve error prejudicial to the appellant. That decree is affirmed.

[fol. 141] In United States Circuit Court of Appeals

[Title omitted]

Judgment—Filed January 6, 1925

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Hartford Accident and Indemnity Company of Hartford, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 142] In United States Circuit Court of Appeals

Clerk's Certificate

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages num-

bered from 132 to 141 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4295, wherein Hartford Accident and Indemnity Company of Hartford is appellant and the Southern Pacific Company, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 131 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 3rd day of February, A. D. 1925.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United States Circuit Court of Appeals.)

[fol. 143] ORDER GRANTING PETITION FOR CERTIORARI—Filed March 16, 1925

On petition for writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

No. [redacted] 45

In The Supreme Court of the United States

OCTOBER TERM [redacted] 1925

HARTFORD ACCIDENT AND INDEMNITY COMPANY OF HARTFORD,

vs.

SOUTHERN PACIFIC COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

In The Supreme Court of the United States

OCTOBER TERM, 1924.

HARTFORD ACCIDENT AND INDEMNITY COMPANY OF HARTFORD,

vs.

SOUTHERN PACIFIC COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Comes now the above named petitioner, Hartford Accident & Indemnity Company, of Hartford, Connecticut, by John Neethe, its proctor, and on behalf of petitioner prays the court to grant a writ of certiorari to review the decree of the United States Circuit Court of Appeals, Fifth Circuit, entered in the above entitled cause.

STATEMENT OF THE CASE.

The owner of the oil tank barge "Bolikow," the National Oil & Transport Company, hereinafter called "Oil Company," now a bankrupt, filed its petition for limitation of liability, in accordance with the provisions of the Ship Owners Limitation of Liability Act, being sections 4282 to 4287 of the Revised Statutes of the United States. At the time this petition was filed, affidavit was made by the Oil Company that the barge's value, after the accident which gave rise

to various claims, was $250.00, and that the pending freight of said barge, at the termination of the voyage was $11,076.85. For the total of these two sums, or $11,326.85, the Oil Company gave a stipulation with the petitioner herein as surety. After due proceedings had, the petition of the Oil Company for limitation of liability was denied. Claimants then filed a motion for a decree against the surety, petitioner herein, for the amount of its stipulation, which motion was resisted by this petitioner on the ground, that, as limitation of liability had been denied, the proceeding ceased to be a proceeding in rem and became one in personam against the Oil Company exclusively, and that by the denial of the petition for limitation of liability the surety on the stipulation was discharged. The District Judge granted the motion for a decree against the surety, resting his decision on the verbiage of the stipulation.

The Circuit Court of Appeals, Fifth Circuit, affirmed the decree of the District Court. It did so, not for the reason given by the district judge, but because "We are not of opinion that the failure of a shipowner to sustain his contention that what he brings into court is solely and exclusively liable to claims required to be asserted in the proceeding can properly be given the effect of changing the nature of the proceeding so far as it is one for the enforcement of such claims or of ousting the court's jurisdiction to subject to allowed claims what was surrendered to the court by the shipowner for the purpose of being subjected to those claims."

REASONS FOR GRANTING THE WRIT.

Whether or not the property tendered into court, or the bond given in lieu thereof, under the admiralty rules of the Supreme Court at the time a petition for limitation of liability is filed by a ship owner remains liable, although such petition is ultimately denied, has never been decided by this high court; nor by any Federal Court; nor, as far as we have been able to ascertain, by any of the admiralty courts of England. As this question is of great importance to the owners of vessels and the surety companies giving such stipulations, we respectfully ask that this petition for a writ of certiorari to review the Circuit Court of Appeals for the Fifth Circuit, in the above entitled cause be granted.

Respectfully submitted,

JOHN NEETHE,

.....

Proctor for Petitioner.

WILLIAMS, NEETHE & WILLIAMS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

In so far as the District Court based its decree upon the verbiage of the bond, it failed to give consideration to the most cardinal rule of construction of written instruments which is that into the stipulation given by this petitioner there must be read the law applicable to the subject matter. And, indeed, it becomes unnecessary to discuss the decision of the District Judge, because the opinion of the Fifth Circuit Court of Appeals

proceeds to affirm the decree on wholly different grounds.

Arguing the sole question to be determined by this court, it may be proper first to discuss briefly the decisions cited by the Circuit Court of Appeals for the Fifth Circuit. A reading thereof will clearly show that they cannot be decisive of the point presented, for the sole reason that it was not up for decision.

The case first cited by the Fifth Circuit Court of Appeals is City of Norwich, 118 U. S. 468, 503, 605. The questions determined by the court in this case were:

First: That the point of time at which the amount of value of the owner's interest in the ship and freight is to be taken for fixing his liability is the termination of the voyage on which the loss or damage occurs, and that when such voyage is broken up before arriving at port of destination, the voyage is then terminated for the purpose of fixing the owner's liability;

Second: That the subsequent raising and repair of the ship, giving her an increased value, could not increase the amount for which the owners could be held liable;

Third: That the ship's owner was not compelled to surrender any insurance he might have carried on the vessel.

The case of The Great Western, 118 U. S. 520, but follows the decision of the City of Norwich (supra), simply distinguishing the former case in some of its facts.

O'Brien vs. Muller, 168 U. S. 287-303, is a case construing a bottomry bond.

In re Morrison, 147 U. S. 14, holds, as far as may be in any way applicable to this case, that an ex parte appraisement is not void and the value of the vessel may be ascertained, as it was in the case, at bar primarily without a hearing of the persons interested adversely.

While in all of these cases, it is said that the bond stands in lieu of the vessel and the freight, none of them hold that when limitation of liability is denied, the bond given in lieu of the vessel and the freight shall nevertheless remain liable.

At the beginning of further argument, it is conceded by petitioner and must be conceded by all parties adversely interested, that no case can be found, either in the American or English reports which decides this precise point. A proceeding for limitation of liability is an equitable proceeding in rem and to support the judgment of the Fifth Circuit Court of Appeals, it is necessary for this court to hold that, though limitation is denied, the res upon which the proceeding is based, that is to say, the vessel and freight, or the bond given in lieu thereof, remain in court and subject to its jurisdiction, although the very ground for tendering the vessel and freight, or for giving the bond has fallen by a denial of the petition for limitation. We contend, that after limitation of liability is once denied, there ceases to be a res in court and the proceeding ceases to be one in rem and becomes, as said by Judge Hough, in one of the cases to which we shall hereafter refer, a proceeding in personam with naught more

jurisdiction left in the court than to ascertain, as in a libel in personam, the amount due each claimant, or to have the court refer this question to a commissioner for like purpose.

The decisions of this high court are unanimous, that the limitation of liability act was passed for the purpose of encouraging ship building and that it should be liberally construed in favor of the ship owners. (See Norwich Co. vs. Wright, 13 Wallace, 104; Steamship Co. vs. Hill Mfg. Co., 109 U. S. 578; Butler vs. Boston Steamship Co., 130 U. S. 551; The Bourgogne, 210 U. S. 95.)

Can it be considered a liberal construction of this act to say that by invoking it and after having been denied its benefits, a ship owner incurs an additional liability, that is to say, the freight earned by his vessel or the liability of the surety on his bond, which would not have existed had he not invoked the provisions of the act. To illustrate from the case at bar,—as hereinbefore stated, the Bolikow, after the disaster, was worth $250.00. This, and this alone, was the res against which the claimants could have proceeded by a libel in rem. It was all that was within the jurisdiction of the District Court. Believing that it was not liable at all, the Oil Company filed its petition for limitation and filed the stipulation hereinbefore referred to. Its petition is denied and the claimants say that, though denied the benefits of the act, it remains subject to the liabilities imposed thereby. The decisions of the District Court and the Circuit Court of Appeals in this case increase rather than diminish the owner's obligation.

The following cases, though they do not admittedly decide the precise point, yet tend to support our contention:

In re Jeremiah Smith & Sons, Inc., 193 Fed. 395: the record shows, that the petitioner asked to have his liability limited; that the ship burned to the water's edge, was surrendered to the trustee and no bond was given. The District Court granted limitation of liability, but the Circuit Court of Appeals reversed this decree with direction to enter a decree, not against the res in court, but against the petitioner in personam without limitation.

The record in the case of the Pacific Mail Steamship Company, 130 Fed. 76, shows that the District Court entered a decree limiting the liability of the owner. This decree was reversed on appeal to the Circuit Court of Appeals for the Ninth District, which ordered the lower court to enter a decree that liability be not limited. No decree was rendered against the surety on the bond given when petition was filed. Is it not reasonable to suppose, that if the Circuit Court of Appeals, reversing this case or the claimants adversely interested, had thought a decree against the surety would be proper they would have asked for it, and the court would have granted it?

The record in the Santa Rosa case, 249 Fed. 160, shows that the proceeding was dismissed, after the court had declined to limit liability, and an order was entered **exonerating and discharging the surety.**

The Jeremiah Smith case is referred to by Judge Hough in the Titanic case, 204 Fed. 285, which again refers to the case in re Myers Excursion & Navigation

Co. (D. C.), 57 Fed. 240, affirmed under the name of The Republic, 61 Fed. 109, and it also refers to The Eureka, 108 Fed. 672.

In commenting upon these cases, Judge Hough, in the Titanic case, says:

> "The first of these litigations illustrates the view that the sole function of a limitation proceeding was to limit recovery in the event of a limitable liability being found. If the liability was not capable of limitation ,the proceeding was at an end. **Both in the District Court and in the appellate courts this doctrine is not asserted but is assumed.**"

He, therefore, construed the holding of these cases to be, that if limitation is denied, the whole proceeding in rem falls.

There are probably cases which lend support to the holding that, though limitation is denied, the court having once acquired jurisdiction of the persons, can adjudicate the rights of the claimants as against the owner, but then as **in personam** only. That by such holding, the courts did not intend the proceeding further to continue as one in rem is shown by the language of Judge Hough in the same case when, referring to the Jeremiah Smith & Sons case, he says:

> "An inspection of the record on appeal in this case shows that although two possible claimants appeared and answered only one filed a claim, so that when the Circuit Court of Appeals issued its mandate (denying limitation of liability) **it practically directed the District Court to proceed to assess damages in an ordinary suit in personam for personal injuries.**"

In the Santa Rosa case the opinion ends:

> "The matters hereinbefore set out in my judgment preclude the petitioner from the right to have liability limited in this proceeding. The claimants may therefore pursue their remedies here or in the state courts as they may be advised. They may elect to remain here and their claims will be referred to the Commissioner. If they do not so elect any order restraining them from proceeding will be vacated."

Much reliance was placed by claimants on the case of The Virginia, 266 Fed. 437. We respectfully suggest that the remarks made by Judge Rose in that case are wholly obiter. The facts were, that the petitioner was not insolvent. In that case the passengers recovered their judgments against a solvent petitioner for limitation of liability—that ended their case. The cargo owners recovered their judgments against the fund tendered by the ship owner into court—that ended their case. No other questions were before Judge Rose, and what he said of what he would do, if the petitioners were insolvent was wholly unnecessary to the questions before him.

We respectfully suggest:

First: That there is no authority binding on this court to enable it to decide the precise point before it;

Second: That the limitation act should be construed that when limitation is denied, the proceeding ceases to be in rem and becomes one in personam, unless indeed the Court loses entire jurisdiction.

Third: That therefore the decree as to the petitioner, the surety on the ship owners' stipulation for value, should be reversed.

Respectfully submitted,

JOHN NEETHE,
EDWIN C. BRANDENBURG,
Proctors for Petitioner.

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Of Washington, D. C.

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Of Galveston, Texas,
Of Counsel.

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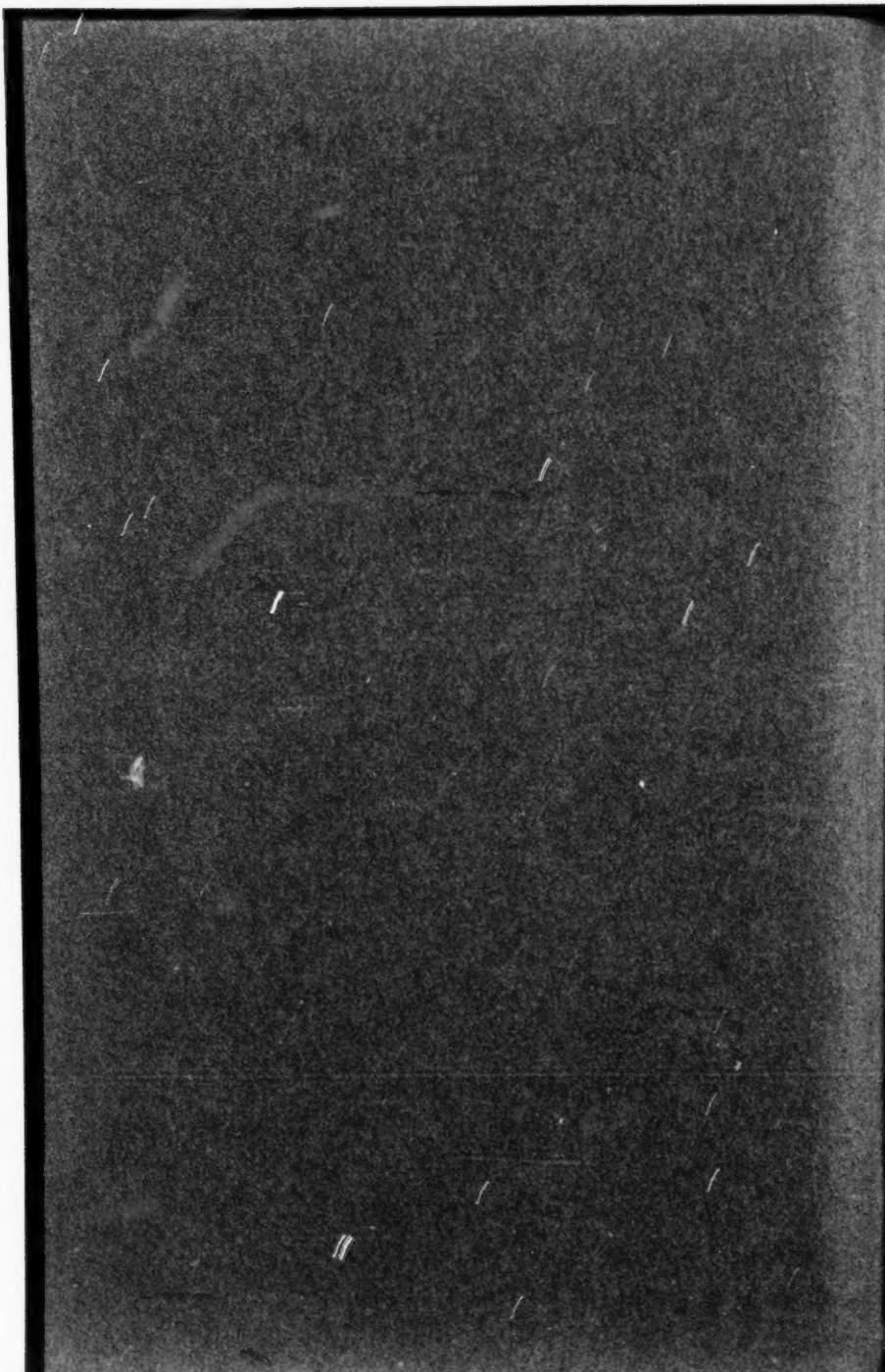

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IN THE

Supreme Court of the United States

OCTOBER, 1925.

No. 290

HARTFORD ACCIDENT AND INDEMNITY COMPANY OF HARTFORD,

Petitioner-Appellant,

vs.

SOUTHERN PACIFIC COMPANY, ET AL.,

Respondents-Appellees.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, granted March 16th, 1925.

BRIEF FOR PETITIONER.

This writ of certiorari was granted to reverse a decree of the United States Circuit Court of Appeals for the Fifth Supreme Judicial District, rendered January 6, 1925, which affirmed a decree of the United States District Court for the Southern District of Texas rendered December 17, 1923, in favor of the appellees herein and against the appellant.

The case in the Circuit Court of Appeals is reported in ..... C. C. A., ... 3rd Fed. Rpt. 2 series, p. 923. (R., page 65.) The opinion of the District Judge has not been reported, but may be found printed record page 58.

The appellant submits that said District Court erred in rendering the decree against it and that the Circuit Court of Appeals erred in affirming it, as more fully shown by its assignment of errors, as follows:

ASSIGNMENTS OF ERROR.

1. The Court erred in holding the Hartford Accident & Indemnity Company of Hartford, Connecticut, surety, was liable on its undertaking;

2. The Court erred in holding the surety liable on its stipulation for value, because such stipulation only provides that the National Oil Transport Company shall file a bond or stipulation within ten days after the value of the petitioner's interest in the barge Bolikow and her pending freight shall have been fixed, and such values have never been determined by appropriate proceedings.

3. The Court erred in holding the surety liable on its stipulation for value, because the condition of the ad interim stipulation only provided that it shall be in force pending the filing of such bond or stipulation as may become necessary for all claims in said limitation proceedings and no such bond became necessary because the petition for limitation of liability was denied to the petitioner, for whose account said stipulation for value was given, and no appeal has been taken from the decree so denying the limitation of liability, and no appeal has been taken from the decree so denying the limitation of liability and the time so to do has long since expired.

4. The Court erred in holding the surety liable because the principal on said stipulation for value and the surety thereon became liable only in the event limitation of liability shall have been granted to the petitioner, and said petition for limitation of liability having been denied, such stipulation is of no further force and effect." (R., pp. 62, 63.)

The case comes here, a writ of certiorari having been granted under the general powers of this Court to grant such writs (Judicial Code, Sec. 240, as amended by Act of February 13, 1925).

STATEMENT OF THE CASE.

Although the record in this case comprises 131 printed pages, proctors for appellant believe that the following facts, and no others, are necessary to be considered by the Court to decide the only question involved in this case:

On October 19, 1921, the National Oil Transport Company (hereinafter called the "Oil Company"), now a bankrupt, filed in the District Court of the United States for the Southern District of Texas, its petition for limitation of liability, in accordance with sections 4283 ot 4285 of the Revised Statutes of the United States, urging, that if liable at all for damages arising from a certain collision, which was denied, it was liable only to the extent of the value of the barge "Bolikow" and the freight that had been earned by her at the time of the accident (R., p. 2). Prior thereto and on October 14, 1921, there was filed by the appellant in said limitation proceeding an ad interim stipulation (R., p. 43), in which the Oil Company, as principal, and appellant, Hartford Accident and Indemnity Company, as surety, undertook in the sum of $11,326.85 with 6% interest from December 23d, 1920, that the Oil Company

would file a bond or stipulation in said proceeding within ten days after the value of the "Bolikow" and freight pending should have been determined by appropriate proceedings, and that pending the filing of such permanent stipulation, should stand as security for all claims in said proceeding for limitation of liability.

Appellee, Southern Pacific Co., filed in said proceeding on January 9, 1922, its claim, denying that the Oil Company was entitled to limitation of liability (R., p. 8), and asked for a decree against it in the sum of $317,988.00. A great many other claims were filed, and it is stipulated between the parties to this record that claims largely in excess of the amount of the bond were proven in these proceedings. (R., p. 2.)

On March 20, 1923, a decree was entered in the District Court denying the petition of the Oil Company. (R., p. 48.) From this decree, no appeal was taken by any party to said proceeding.

On August 17, 1923, appellees moved for a decree against the Oil Company and the surety on its ad interim stipulation (R., p. 55), to which the surety objected for various reasons (R., p. 58), the main one, and the one most particularly relied on before this high Court being, that as limitation of liability had been denied, its obligation as surety was of no further force and effect, and that upon such denial of limitation, the Court ceased to have jurisdiction over the res in court or the stipulation given in lieu thereof.

On December 17, 1923, the contention of the surety that it be relieved was denied by the court and it was adjudged liable for the full sum of $11,326.85, with interest and costs. (R., pp. 59-62.)

Upon the foregoing, it is contended by appellant:

(a) That when a petition for limitation of liability brought under sections 4283 to 4285 of the United States Statutes is denied, the court loses jurisdiction of the subject matter and can enter no decree except one of dismissal;

(b) Even if it be held that the court retains jurisdiction, the proceeding upon denial of the petition for limitation ceases to be one in rem but becomes one in personam, and each intervening claimant becomes a libellant in a libel in personam against the ship owners as respondent.

(c) When a petition for limitation of liability is denied, the stipulation given in connection therewith can be of no further force or effect, as it was given solely for the purpose of enabling petitioner to limit his liability.

BRIEF OF THE ARGUMENT.

In the beginning, we respectfully call the attention of this high Court to the fact, that the Act for limitation of liability was passed for the purpose of encouraging ship owners and ship building. It has been repeatedly held that it should be liberally construed in favor of owners. This is shown by the decisions of this court.

In Norwich vs. Wright, 13 Wall., 104, it was held to apply to collision cases. In Providence etc. Steamship Company vs. Hill Mfg. Co., 109 U. S., 578, it was extended to cover loss by fire. In Butler vs. Boston S. S. Co., 130 U. S., 527-551, it was extended to personal injuries, as well as to injuries of property.

And, indeed, the doctrine to the effect that this statute should be construed liberally in favor of the ship owner is reaffirmed in the La Bourgoyne ,210 U. S., 95-120, and the many authorities cited in that case.

How can it be a liberal construction of this Act, to say, that by invoking it and after having been denied the benefits of it, a ship owner incurs an additional liability, that is to say, the liability of the surety on the bond he has given, which would not have existed had he not invoked the provisions of the act. To illustrate from the case at bar: The Bolikow was sold after the disaster for the sum of $250.00. This ,and this alone, was the res against which the appellee and other claimants intervening in the limitation of liability proceeding could have proceeded against by a libel in rem. It was all that was within the jurisdiction of the court. Believing that it was not liable at all, the Oil Company filed its petition and the ad interim stipulation adding to the $250.00, value of the wrecked vessel, the freight earned by her on her last voyage, amounting to about $11,000.00. Its petition is denied and appellees claim, that though denied the benefits of the Act, it remains subject to the liabilities imposed by it. The decision of the courts below increase, rather than decrease the liability of the owner, by adding to his own the responsibility of his surety.

As indicated above, we ask this court to determine the effect of a decree denying a petition for limitation of liability under the sections of the Federal Statutes hereinbefore referred to and more especially what effect such denial has on the stipulation given by petitioner in such proceeding. This, of necessity, will depend on the determination of two questions: First, can a Federal Court, after dismissal of the petition of limitation of liability, retain jurisdiction of the subject matter at all, and second, if it can, can it nevertheless hold liable the res in court or the bond given in lieu thereof? These two points we will discuss in one brief argument.

For the convenience of the court, we insert the sections of the statute providing for limitation of liability:

Section 4283 reads as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, lost, damage or forfeiture done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Section 4284 reads as follows:

"Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise or any property whatever, on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entilted thereto."

Section 4285 reads as follows:

"It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants to a trustee to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to

be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

And we also insert the rules of this Court passed in pursuance of this statute:

"LIMITATION OF LIABILITY—HOW CLAIMED

51.

"When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An act to limit the liability of ship owners and for toher purposes" now embodied in sections 4283 to 4285 of the Revised Statutes, as now or hereafter amended or supplemented, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same in support, or for the giving of a stipulation with sufficient sureties or an approved corporate surety for the payment thereof into court with interest at the rate of 6% per annum from the date of said stipulation and costs, whenever the same shall be ordered; or, if the

said owner or owners shall so elect, the said court shall, without such appraisement make an order for the transfer by him or them of his or their interest in such vessel and freight to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than thirty days from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the postoffice, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect to any such claim or claims.

"PROOF OF CLAIMS IN LIMITED LIABILITY PROCEDURE.

52.

"Proof of all claims which shall be filed in pursuance of said monition shall thereafter be made before a commissioner to be designated by the court, or before the court as the court may determine, subject to the right of any person interested to question or controvert the same and on the completion of said proofs, the commissioner shall make report, or the court its finding on the claims so proven, and on confirmation of said commissioner's report, after hearing any exceptions thereto, or on such finding by the court, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expense) shall be divided pro rata amongst the several claimants in proportion

to the amount of their respective claims, duly proved and ionfirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

"DEFENSE TO CLAIM IN LIMITED LIABILITY PROCEDURE.

53.

"In the proceeding aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage or injury (independently of the limitation of liability claimed under said act), provided he, it or they shall have complied with the requirements of Rule 51 and shall also have given a bond for costs and provided that, in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have filed his or their claim under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both, provided such answer shall in suitable allegations state the facts and circumstances by reason of which liability is claimed or right to limitation of liability should be denied."

It may be well first to consider the opinions of the District Judge and of the Circuit Court of Appeals and the authorities therein cited, as well as those relied on by appellees.

In so far as the opinion of the District Court holds that appellant is bound by the verbiage of the bond, it fails to give consideration to the most cardinal rule of construction of written instruments, which is, that into the stipula-

tion given, there must be read the law applicable to the subject matter. It is a proposition of law well settled by all of the authorities, that in construing a written instrument, there must be read into that instrument the law appertaining to the subject matter thereof, and this is true, no matter how conclusive and definite the language of the instrument may be. From the many cases that illustrate this proposition, appellant calls attention to only a few, because they are most in point:

In the case of Societe' Napthes Transports vs. Bisso Towboat Co., at al, 241 Fed., 463, an opinion rendered by the United States Circuit Court of Appeals, the facts were as follows:

The owners of the motorship Motorcine filed a libel against the steamship Crown of Galicia and the towboat W. A. Bisso, charging that both of these vessels were at fault in a collision. Each of the vessels gave a stipulation and for the Bisso, an ordinary release bond in the sum of $75,000 was given. Later, the owners of the Crown of Galicia brought suit against the Motorcine and, as a result, this vessel proceeded against the Bisso. It was then and not until then that the owners of the Bisso petitioned the court for limitation of liability, asking an appraisement be made in accordance with law. The Bisso, under appraisement duly had, was valued at $55,000. The Court, of course, is acquainted with the verbiage of the usual release bond, and that it is an unqualified promise to pay the sum that may be awarded to libellant, not to exceed the amount stipulated. Yet, the Circuit Court of Appeals held that by giving a bond for the amount of the appraised value of the Bisso in the limitation of liability proceeding, the release bond given in the collision case, which was $20,000 larger than the limitation bond, was canceled and extinguished.

The Court says:

> "The liability of both principal and surety on a bond are impliedly subject to the limitation statute. In other words, though upon its face the release bond was an absolute promise to pay, it should be read in connection with the existent law on the subject and not according to its verbiage only."

The case of the Monongahela River Consol. Coal & Coke Co. vs. Hurst, 200 Fed., 711, is a case still stronger for the construction of the bond contended for by appellant. In that case the owner of the vessel had been sued. A judgment had been rendered against him and a supersedeas bond had been given by him. The condition of the bond was that execution should be stayed and that the appellant would pay the judgment if it was affirmed. It was affirmed. Yet, the court held that even this solemn promise must be taken in connection with the law of the land and the words so limited that, even after supersedeas and affirmance, limitation of liability could be sought and that not the verbiage and absolute promise to pay in the supersedeas bond should fix the liability of the owner, but that the limitation statute must be read into the bond and fix the owner's liability at the appraised value of the vessel.

In the case of The Rose Culkin, 52 Fed., 328-331, the owner gave a release stipulation in the sum of $3,500. Later in a proceeding for limitation of liability the vessel was sold and realized $888.05. Judge Brown held that the owner's liability was fixed not by the verbiage of the stipulation first given, but by the law of the land under the limitation statute.

We now come to a discussion of the opinion of the Circuit Court of Appeals and the cases on which Judge Walker of that court relies for his affirmance of the decree against

this appellant. It might be well here to state that the Circuit Court of Appeals does not, in affriming the decree, follow the reason given by the District Judge. But we respectfully submit, that a reading of the decisions relied on by the Circuit Court of Appeals for affirmance cannot be decisive of this case. This for the sole but all important reason, that the point now before this high Court was not before it when it rendered the decisions cited in the Court of Appeals opinion.

The case first cited by the Circuit Court of Appeals is: City of Norwich, 118 U. S., 468, 503, 506.

The questions determined by this court in that case were: First: That the point of time at which the amount of the value of the owner's interest in the ship and freight is to be taken for fixing his liability is the termination of the voyage on which the loss and damage occurred, and that when such voyage is broken up before arriving at port of destination, the voyage is held to be terminated for the purpose of fixing the owner's liability;

Second: That the subsequent raising and repairing of the ship, giving her an increased value, could not increase the amount for which the owner be held liable.

Third: That the ship owner was not compelled to surrender any insurance which he might have carried on the vessel.

The case of Great Western, 118 U. S., 520, but follows the City of Norwich (supra) and simply distinguishes the former case in some of its facts.

O'Brien vs. Miller, 168 U. S., 287, 303, is a case construing a bottomry bond.

In re Morrison, 147 U. S., 14, is applicable to this case only to the extent that an ex parte appraisement is not void and the value of the vessel may be ascertained, as it was in the case at bar, primarily without a hearing of the persons interested adversely. This is not controverted by appellant here.

It is true, that in all these causes, it is said that the bond stands in lieu of the vessel and freight, but none of them hold that when limitation of liability is denied the bond given in lieu of the vessel and the freight shall nevertheless remain liable.

It is conceded by all parties, that, except inferentially in the cases which we shall hereafter cite, the precise question now before this Court has never been determined. It is true that the case most relied upon by appellee, The Virginia, 266 Fed., 437, is apparent authority for the appellees. But, in so far as it is not disposed of by the granting of a writ of certiorari herein, we call attention to the fact that the remarks made by Judge Rose in that case, sustaining appellee's contention, were wholly obiter. The facts there were that the passengers recovered their judgments against a solvent petitioner for limitation of liability and that ended their case. The cargo owners recovered their judgments against the fund tendered by the ship owner into court—that ended their case. No other questions for determination were before Judge Rose, and what he said of what he would do if the petitioner were insolvent, was wholly unnecessary for the decision of the questions before him.

It is, of course, admitted that a proceeding for limitation of liability is a proceeding in rem; or, to use the language of some of the decisions, an equitable proceeding in rem. It is necessary therefore for counsel of appellees to

contend that, though limitation is denied, the res upon which the proceeding is based—that is to say the vessel and freight or the bond in lieu thereof, remains in court, though by a denial of the petition of limitation of liability the very reason for giving it does not longer exist and the equitable proceeding ceases.

We contend that after limitation for liability is once denied, there ceases to be a res in court and the proceeding should either be dismissed, or cease to the one in rem and become, as said by Judge Hough, in one of the cases to which we shall hereafter refer, a proceeding in personam, with naught more jurisdiction left in the court than to ascertain, as in a libel in personam, the amount due each claimant, or to have the court refer this question to a commissioner for a like purpose.

Can this be construed a liberal construction of the act?

The four cases which we now will briefly refer to, if logically followed, are bound to lead to a decision in favor of the appellant.

In re Jeremiah Smith & Sons, Inc., 193 Fed., 395.

In re Pacific Mail S. S. Co., 130 Fed., 76 (C. C. A., 9th Dist.)

The Santa Rosa, 249 Fed., 160.

The Titanic, 204 Fed., 295.

In the first three cases the owner's petition for limitation of liability was denied. The opinions in these cases fail to show what disposition was made of the res in court or of the surety on the bond given in lieu thereof. It became necessary, therefore, to examine the original records in each of these cases, which counsel for appellant caused to be done, with the following results:

In the Jeremiah Smith case the record shows that the petitioner asked to have his liability limited; that the ship burned to the water's edge, was surrendered to the trustee and that no bond was given. The Circuit Court of Appeals reversed the decree of the District Court, granting limitation of liability, with direction to enter a decree against the petitioner for damages sustained by the claimants without any limitation whatsoever.

The record in the Pacific Mail S. S. Co. case shows that the District Court entered a decree limiting the liability of the owner. This decree was reversed on appeal to the Circuit Court of Appeals for the Ninth Circuit, which ordered the lower court to enter a decree thta the liability be not limited. No decree was rendered against the surety on the bond filed by the petitioner. It is not reasonable to suppose that if claimants or the court reversing the case had thought the former were entitled to a decree against the surety they would have asked for it and the Court granted such request.

The record in the Santa Rosa case shows that the entire proceeding was dismissed upon stipulation of the parties, after the court had declined to limit liability, and an order was entered **and exonerating and discharging the surety.**

The Jeremiah Smith case is referred to by Judge Hough in the Titanic case, 204 Fed., 295, and in which also refers to the case in re Myers Excursion & Navigation Co., 57 Fed., 240, affirmed under the name of The Republic, 61 Fed., 109, and to The Eureka, 108 Fed., 627. In commenting upon these cases, Judge Hough in the Titanic case, supra, says:

> "The first of these litigations illustrates the view that the sole function of a limitation proceeding was to limit recovery **in the event of a limitable liability being found.** If the liability was not capable of limitation, the proceeding was at an end. **Both in the**

District Court and in the appellate courts this doctrine is not asserted but is assumed."

He, therefore, construed the holding of these cases, and as we contend rightly, that if limitation is denied the whole proceeding falls, and the District Court has no longer any jurisdiction of the parties or the subject matter.

There are some cases which seem to support the holding, that though limitation is denied, the court, having once acquired jurisdiction of the persons, can adjudicate the rights of the claimants as against the owners, but even those hold, that it can do so in personam only. That by retaining jurisdiction, the courts thus holding did not intend the proceeding further to continue as one in rem but as one in personam only is shown by the language of Judge Hough in the case hereinbefore cited. In referring to the case of Jeremiah Smith & Sons, supra, he says:

> "An inspection of the record on appeal in this case shows that although two possible claimants appeared and answered, only one filed a claim, so that when the Circuit Court of Appeals issued its mandate denying limitation of liability, **it practically directed the District Court to proceed to access damages in an ordinary suit in personam for personal injuries."**

In the San Rosa case (supra) the opinion ends:

> "The matters hereinbefore set out in my judgment preclude the petitioner from the right to have liability limited in this proceeding. The claimants may therefore pursue their remedies here or in the **state courts,** as they may be advised. They may elect to remain here and their claims will be referred to the Commissioner. If they do not so elect, any order restraining them from proceeding will be vacated."

To hold that after limitation of liability is once denied the court could still proceed to adjudicate the rights of the

various parties would necessitate a holding that the rights of the intervening claimants against the ship owner whether sounding in contract or in tort and whether arising in admiralty or not can be adjudicated in a federal court, though they may arise between citizens of the same state. Such holding would further mean that, though each claimant as against the owner is entitled to a jury, the limitation of liability act would deprive him of such privilege. It would mean that a claimant has certain rights and remedies against a shipowner of which he would be deprived, by the ship owner merely filing a petition asking for limitation.

We respectfully contend that it was never the intention of the Congress to so limit the rights of the intervening claimaints in case limitation of liability was denied. There is nothing in the act or rules indicating such purpose. We contend when once limitation is denied, the parties ought to be allowed to proceed as they could have done originally. In other words, if limitation is denied all parties ought to be placed in statu quo ante.

It was urged in oral arguments in the court below and may be in this Court that by filing a limitation petition and the issuance of the injunction preventing all parties to proceed except in such limitation proceeding might prevent those in interest to enforce their rights if limitation of liability was not granted, within the time provided by such statutes of limitation as might be applicable. This is clearly not tenable, because it is a well settled rule of law, if A by his acts deprives B from proceeding against him, the period during which such prevention continues will not be counted as portion of the time which completes the statute of limitation, or the court will hold defendant estopped from pleading defense of limitation. As it is expressed in 17 Ruling Case Law, p. 870:

> "Where the character of legal proceedings is such that the law restrains one of the parties from exercising a legal remedy against another, the running of the statue of limitations applicable to the remedy is postponed, or, if it has commenced to run, is suspended, during the time the restraint incident to the proceeding continues."

We respectfully suggest that this Honorable Court should decide, that after limitation of liability has once been denied, the Federal Court ceases to have jurisdiction and that the claimants can enforce their rights against the ship owner in whatever way they may, and should, certainly hold, that even if the Federal Court a claimant's cause of action ceases to be a cause in rem and becomes one in personam, with no liability of the res or the bond given in lieu thereof.

Respectfully submitted,

EDWIN C. BRANDENBURG,
JOHN NEETHE,
Proctors for Petitioner.

WILLIAMS, NEETHE & WILLIAMS
of Galveston, Texas,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 45

HARTFORD ACCIDENT AND INDEMNITY COMPANY OF HARTFORD,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, granted March 16th, 1925.

BRIEF FOR RESPONDENTS.

BURLINGHAM, VEEDER, MASTER & FEARY,
of New York.

TERRY, CAVIN & MILLS,
W. T. ARMSTRONG,
W. E. CRANFORD,
of Galveston,

Proctors for Respondents.

GRAPP BROS., STATIONERS & PRINTS., GALV.

INDEX AND SYNOPSIS.

TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 290

HARTFORD ACCIDENT AND INDEMNITY COMPANY OF HARTFORD,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, granted March 16th, 1925.

BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

With the following additions and corrections the statement of the case as made by the appellant is substantially correct:

The appellant omits to state that before the approval of the so-called ad interim stipulation by the court there was presented to the court ex parte appraisals of the value of the petitioner's interest in the vessel and her pending freight, in the form of an affidavit of P. J. Barry, in which he appraised the value of the vessel at Two Hundred and Fifty ($250.00) Dollars and her pending freight at not exceeding Eleven Thousand and Seventy-six Dollars and

Eighty-five Cents ($11,076.85), and an affidavit of W. Hyland, in which the appraised the value of the vessel at Two Hundred and Fifty ($250.00) Dollars and the pending freight not in excess of Eleven Thousand and Seventy-six Dollars and Eighty-five Cents. (Rec. pp. 40 and 41.)

Upon the presentation of the petition and the affidavit of appraisement to the court the court then ordered the petitioner to file an ad interim stipulation for the value of said barge and the maximum possible amount of pending freight, amounting to the sum of Eleven Thousand Three Hundred and Twenty-six Dollars and Eighty-five Cents, with interest from the 23rd day of December, 1920, and to this order the court appended the further following order:

> "Ordered that any party may apply to have the amount of the stipulation so increased or diminished as the case may be on report of the commissioner appointed to appraise the amount of the petitioner's interest in the said Barge BOLIKOW and her pending freight, if any, or on the ultimate determination of the court and exceptions to the commissioner's report." (Rec. pp. 41 and 42.)

Thereupon the ad interim stipulation reciting the order of the court fixing the said amount as the maximum interest in the Barge BOLIKOW and her pending freight was filed with and approved by the court. (Rec. p. 43.)

The original petition for limitation of liability not only alleged grounds for limitation of liability to the value of the barge and her pending freight but asserted an entire want of liability, alleging that the damages suffered by reason of the explosion on board the Barge BOLIKOW was occasioned without any fault or negligence on the part of petitioner or any of its agents, servants or employes,

the exact allegation with respect to the causes of such damages being as follows:

> "That any and all damage sustained by any and all persons from said explosion after the Tug BARWICK attempted to pull the burning BOLIKOW out of the slip was not caused nor contributed to by your petitioner or by any of its agents, servants and employes, but was solely caused by the negligence of those in charge of the Steamship EL OCCIDENTE and those in charge of the Steam Tug GERTRUDE, a towing vessel which attempted to move EL OCCIDENTE from the slip."

The petition then sets up the specific faults of these vessels, which are omitted here. (Rec. p. 4.)

The petition then prays that all persons having any claims for damages arising out of the explosion and disaster be compelled to present their claims in the limitation proceedings and for injunction against them from prosecuting them elsewhere, and that the court, "In this proceeding would adjudge that the petitioner and the said Barge BOLIKOW are not, and neither of them is liable to any extent for any loss, damage or injury arising therefrom, or if it shall adjudge that they or any of them are liable then that the liability of the petitioner be limited to the amount of the value of its interest in the said Barge BOLIKOW," etc. (Rec. p. 7.)

Upon the presentation of the petition, the affidavits of appraisal, and the stipulation for the appraised value of the barge and her pending freight, the court made the usual order for a monition and notice to all claimants to present their claims in the limitation proceedings, and an injunction restraining the prosecution of any claims resulting from the accident alleged in the petition in any other forum or in any other way except in the limitation proceeding. (Rec. pp. 44-46.)

The Appellee, Southern Pacific Company, then filed its claim in the proceeding, and in addition an answer and cross action against the petitioner for the amount of its damages, in which it asserted that the damages suffered by it were due to the negligence and fault of the petitioner and its agents, servants and employes, and prayed for an affirmative judgment, irrespective of whether limitation was allowed or denied, for the entire amount of its damages. (Rec. pp. 8-40.)

The final judgment entered by the court after objection had been made to it by the Appellant awarded judgments in favor of all claimants for the full amount of their damages found, and a distribution of the fund among the various judgments pro rata after the payment of the costs of court. (Rec. pp. 59-62.)

The judgment, so far as it affected the rights of the surety company, did not award an affirmative judgment against the surety company in the sum of Eleven Thousand Three Hundred and Twenty-six Dollars and Eighty-five Cents with interest, as stated by Appellant, but merely ordered the surety company to cause its principal to return the fund into court for distribution. This portion of the decree is here set out in full:

> "Third: And it appearing to the Court that the petitioner, National Oil Transport Company, did, on the 14th day of October, 1921, file herein and present to this Court the affidavit of R. J. Barry, Vice-President of the petitioner company, making oath and declaring the value of the said Barge BOLIKOW after she was burned as the result of the explosion thereon on December 23rd, 1920, the occurrence in respect to which the petitioner prays for a decree of limitation of liability and for exemption from liability, and did on the same date file and present a like affidavit of W. Hyland, District Manager of the petitioner company, each making oath and declaring the value of said barge immediately after said occurrence to be $250.00,

for which sum it was sold at auction and that at the end of the voyage of said Barge BOLIKOW which terminated with the said explosion and the said burning of said barge, the amount of her pending freight at the end of the voyage was not in excess of $11,076.85 and did present to this court its stipulation for the value of said barge and pending freight with Hartford Accident & Indemnity Company as co-stipulator and surety thereon in the sum of $11,326.85 with 6% interest thereon from December 23rd, 1920, the date of said explosion and fire and undertaking to file in this proceeding a bond or stipulation for the value of the petitioner's interest in said Barge BOLIKOW and her pending freight, with 6% interest thereon from December 23rd, 1920, within ten days after the determination of such value by appropriate proceedings an order fixing such value entered herein, and that pending the filing of such bond or stipulation said undertaking will stand as security for all claims in the said limitation proceedings;

"And it further appearing to the court that said bond was accepted and approved by this court in said sum as being for the value of the petitioner's maximum interest in said barge and her pending freight, for the purpose of this proceeding, and did fix the value of said barge and pending freight for such purposes in the said sum of $11,326.85, subject to the rights of any party or interest for reappraisal of the said Barge BOLIKOW or her pending freight, and that thereupon this court ordered monition to be issued and published in due form against all persons claiming damages for any and all the aforesaid explosion of the said Barge BOLIKOW and the subsequent burning of said Barge, or in any other way resulting from said disaster, and citing them to appear before this court and make proof of their respective claims, and did make an order staying and restraining the beginning or prosecution of any or all suits, actions or legal proceedings of any nature or description whatsoever against said barge or her owners at the time of the aforesaid disaster, with respect to any such claim or claims, and that said

monition was thereupon issued and published in due form, and these proceedings had;

"And it further appearing to the court that neither the petitioner nor its stipulator nor any other party or interest has moved for or caused any re-appraisal or appraisal of the petitioner's interest in said barge and her pending freight, or either of them, or caused any order to be entered by the court fixing such value except as was done by the approval and filing of said ad interim stipulation as aforesaid and the issuance and publication of a monition thereon as aforesaid, and it further appearing to the court that no bond for value other than said ad interim stipulation has been filed herein by the petitioner and it appearing from the evidence introduced on the trial hereof, and the court here and now finding that the value of the petitioner's interest in said barge at the termination of her voyage is $250.00, and that the value of the petitioner's interest in the said voyage is $11,076.85 and that the total value of said petitioner's interest in said barge and her pending freight at the termination of her said voyage is $11,326.85; It is, therefore, ordered and decreed that unless this decree be satisfied or an appeal be taken therefrom within the time limited by law and the rules and practice of this court, the stipulator for value will cause the said petitioner to pay into court the sum of $11,326.85, the amount of the value of the petitioner's interest in the said barge and her pending freight at the termination of her said voyage, with 6% interest from December 23rd, 1920, to be applied in payment of the costs of court the remainder to be pro-rated among the respective claimant-respondents in proportion to the amounts of the decrees entered in their favor herein, or show cause why execution should not issue therefor against goods, chattels and lands of the stipulator for value.

"It is ordered by the court that the said amount of money stipulated for in said bond for value when same shall have been paid into court, or recovered

under execution, be first applied to the payment of all court costs, according to the decrees herein entered and that the portion of same remaining, if any, be distributed among the claimant-respondents awarded decrees herein, pro-rated according the amounts of the respective decrees, to all of which the Hartford Accident and Indemnity Co., the surety on the bond of petitioner herein, excepts insofar as this decree holds said surety liable, and National Oil Transport Company excepts to all decrees and recoveries allowed against it either in this decree or in said interlocutory decree of March 20, 1923, which is hereby made final."

BRIEF OF ARGUMENT.

FIRST POINT.

The court had the right to decree the payment into court of the appraised value of the Barge BOLIKOW and her pending freight for such disposition of it as the court could legally have made of it had it originally been paid into the registry of the court and not been bailed out.

As has been shown, the judgment against the surety was that it cause its principal to return the limitation fund into court.

The statute providing for limitation of liability in terms provides for an actual surrender of the vessel and her pending freight to the court. (Act of March 3, 1851, R. S. Secs. 4282, 4283, 4284, 4285.)

This Court in **The Benefactor**, 103 U. S. 239, stating its conception of the nature of the action promulgated the rules which now govern the procedure in these cases, and it is manifest from the language of the court in this case, and from the rules, that an actual surrender of the vessel and her pending freight to the court is contemplated, and that the giving of the bond as allowed by the rule (now Admiralty Rule 51) amounts to a mere bailing out to the

owners of the property, in which case the bond becomes merely a substitute for the res in court, that is, the value of the vessel and her pending freight.

The principle that there occurs a complete and irrevocable surrender of the actual property to the court is frequently expressed by the courts.

In the case of Prov. & N. Y. Steamship Co. vs. Hale Mfg. Co., 109 U. S. 578, 607, this Court used the following language:

> "The proceedings under the Act having been duly instituted in this court it acquired full jurisdiction of the subject matter, and having taken such jurisdiction **and procured control of the vessel and freight or their value,**" etc. (black letter ours).

Again in Morrison vs. District Court of the United States, 68 U. S. 34, 37, it again said:

> "**The stipulation stands in the place of the vessel and her pending freight,**" etc. (black letter ours).

Other apt cases are:

The H. F. Dimock, 52 Fed. 598;

The Wanata, 95 U. S. 600, 611;

U. S. vs. Ames, 99 U. S. 35, 36, 25 L. Ed. 295;

The City of Norwich, 118 U. S. 468, 506, 30 L. Ed. 134, 142.

The bailing out of the limitation res, that is, the vessel and her pending freight, or the value thereof, does not work a diminution of the right of the court to make such disposition of it as it would have had the bailing out not taken place. This seems to appear from the language of the court in The H. F. Dimock, supra, where it was said:

> "No doubt the creditors have a right to have the vessel and its full value applied upon their claims. The

statute only provides in terms for a transfer of the vessel itself. Rule 54 in providing for the giving of a stipulation as a substitute for the vessel was not designed to deprive the creditor of any substantial right."

The same idea is conveyed by the following language of the court in The Wanata, supra:

> "Whenever a stipulation is taken in admiralty for the property subject to legal process and condemnation the stipulation is deemed a mere substitute for the thing itself, and the stipulators are held liable to the exercise of all those authorities on the part of the court which it could properly exercise if the thing itself were still in the custody of the court."

And this doctrine is approved in the case of U. S. vs. Ames, supra.

Again, in **The City of Norwich, supra,** the same rule is stated. In this case the court said:

> "The stipulation given merely stood in the place of the vessel itself **and did not deprive the court of any of its power.**" (Black letter ours.)

Whether the vessel and her freight remains in court or is bailed out, the standard of liability remains the same. So holds this Court in The City of Norwich, supra, where it is said:

> "And the benefit of the statute may be obtained either by abandoning the vessel to the creditors or persons injured or by having her appraisement made and paying the money into court or giving a stipulation in lieu of the vessel and keeping the vessel. This double remedy given by our statute is a great convenience to all parties. It does not make two measures or standards of liability; for the measure is the same whichever course is adopted."

It is clear, therefore, that if the trial court had the right to distribute the value of the vessel and her pending freight in payment of the costs and pro rata upon its judgments in favor of damage-claimants, it had the power to decree against the stipulators that they cause the payment into court of the res, that is, the vessel and her pending freight, for such distribution, and the stipulator has no cause of complaint against the action of the court in any disposition of the res which it could under any other circumstances of the case lawfully make. (The Lydia, 1 Fed. (2nd) page 69, Adv. Sheet November 13, 1924, and cases discussed therein.)

And since this appeal is a trial de novo upon the issues involved in the assignments of error this Court must under the above principles determine the question involved in the assignment, that the court erred in decreeing that the appellant require its principal to return the res into court to be applied upon the costs and the judgments of the court just as though it had the sum of $11,326.85 with 6% interest from December 23rd, 1920, the amount of the appraised value of the Barge BOLIKOW and her pending freight actually in the registry of the court. For the effect of the appeal is to bring this fund into this court for its disposition upon the determination of this appeal. See U. S. vs. Ames, supra, where the court says:

> "Where an appeal is taken from the decree of the District Court the res, if not released, or the bond or stipulation for value, follow the cause into the Circuit Court where the fruits of the property * * * may be obtained in the same manner as in the court of original jurisdiction."

The question then for this court to determine, bared of all confusions which may result from the fact that a stipulation for the value of the res was given instead of a surrender of such value into the court, is, having possession of

the vessel and her freight, will this court decree that it be returned to the owners' bankrupt estate even though it gives a judgment against the owner, or will it order, first, that it be applied in payment of the costs, and second, that the balance be applied pro rata upon the judgment which it gives?

SECOND POINT.

The judgment of the court below in applying the res, that is, the fund representing the value of the vessel and her pending freight, to the payment of the costs and upon its judgments in favor of the claimants-respondents in full, pro rata, was right, and the appellant, surety company, the surety upon the petitioner's stipulation for the value of the vessel and freight, cannot complain of the decree against it that it cause such value to be paid into court according to the stipulation of its principle, for the purpose of such application.

The appellant denies the right of the trial court to apply the res in satisfaction of the costs and the judgments of the court, and upon the following grounds:

First: Because when the court denied limitation of liability the litigation was at an end and the court had no jurisdiction to do other than dismiss the entire matter and release the fund, or

Second: That if the court had jurisdiction to go further and render an affirmative judgment in favor of the claimants-respondents for their damages, it nevertheless lost control over the fund because when limitation was denied there ceased to be a res in court.

The appellee contends that the appellant is wrong in these contentions and that the court had the right to apply the res, that is, the vessel and pending freight, in its possession and under its control, to the satisfaction of the court

costs and upon the judgments in favor of the claimants pro rata, and the court was right in decreeing such disposition of the funds, and was, therefore, right in calling upon the surety to cause its principal to perform its stipulation for the return of the res into court for that purpose.

The reasons urged by appellee for its contention in this respect are as follows:

1st.—The denial of limitation of liability in a case where the petitioner has prayed as well for total exemption as for limitation of liability, and the claimants have joined issue on both issues and prayed for denial of limitation and judgment in full for their damages, does not terminate the case, but the court has jurisdiction to hear the entire case upon the issues made by the petition and the claims of the damaged claimants and to render judgment in favor of the damaged claimants in full.

2nd.—The petitioner, having sought both total exemption of liability and limitation of liability in this proceeding, the surrender of the vessel and her pending freight to the court was a complete and total abandonment of this property to the court for the satisfaction of all established claims against him arising out of the occurrence set forth in the petition, that is, the explosion of the Barge BOLIKOW, irrespective of whether the amount of recovery upon those claims should be limited to the value of the vessel and her pending freight immediately after the accident, or whether judgments in full should be rendered against him.

3rd.—In a case where the petitioner has prayed for limitation of liability and for a decree of total exemption, and has tendered the res in court either actually or by giving stipulation, the Supreme Court rules clearly contemplate the distribution of the fund among the damaged claimants who prove up their claims and have them al-

lowed, irrespective of whether limitation is granted or denied. Upon strict interpretation of them it appears that the only case in which a return of the fund to the petitioner in such a case may be made is when total exemption is granted and relief of any kind is denied.

4th.—In a limitation of liability proceeding, where total exemption is sought by the petitioner and judgment in full is sought by the damaged claimants, a judgment in favor of the damaged claimants for the full amount of their damages, insofar as the res, that is, the vessel and her pending cargo, is concerned, is a judgment against the res, and insofar as the petitioner is concerned is a judgment against the petitioner in personam, and the petitioner has no right in the fund except to have it credited upon the judgment. There is no logical support for the conclusion that in such a case the fund is released, though its owner may not be released. The owner has not placed the funds in court merely for the purpose of securing limitation of liability, but by virtue of his petition in which he procures a litigation of the question of his entire liability, compels the damaged person to present his claim in such proceeding, and prevents him by injunction from proceeding in any other way against the petitioner, or his property, he places the fund in court to abide the result of the decision of the court upon all of the issues made by his petition and the claims of damaged persons.

5th.—A man's property is always subject to seizure by the courts for the satisfaction of judgments rendered against him or his property. In common law courts it is reached by attachment, execution or garnishment, or writs in the nature of these, when not in the actual possession of the court, or by direct order of the court when it is in the possession or control of the court. In a court of admiralty it is reached by direct application of any property or fund which the court may have in its possession or under

its control, after judgment found against the individual or his property, and this is particularly true when such property has been given into the custody of the court for the purposes of the particular litigation in which the judgment is rendered, although it is not essential to the right of an admiralty court to apply property in its possession in satisfaction of established claims against its owner, that the fund come into its possession for that sole purpose.

6th.—It would be unjust and inequitable to release to the petitioner its property when by the injunctive processes of the court it has tied the hands of damaged claimants until it has become insolvent and bankrupt and without property other than the res in court, out of which a judgment in personam could be made.

There is no support in the cases for the contention of the appellant that in a limitation proceeding when limitation is denied the proceeding is at an end. It is true that in the earlier cases such as The Republic and The Eureka, as stated by Judge Hough in the case of The Titanic, 204 Fed. 295, the doctrine "is assumed," though not asserted, but when the question came squarely before the courts it was definitely decided by the lower courts that in a limitation proceeding where exemption from liabiilty as well as a right to limit liability is asserted, the court has complete and exclusive jurisdiction of the entire controversy and may proceed to render a final decree for the full amount of damages in favor of the claimant even though limitation of liability is denied. Neither the Jeremiah Smith case, 193 Fed. 395, The Pacific Mail S. S. Company case, 130 Fed. 76, The Santa Rosa case, 249 Fed. 160, nor The Titanic, 204 Fed. 295, cited by appellant, holds a contrary doctrine, nor do they afford any basis for the contention of the appellant; on the contrary, they are well under-

stood authority for the proposition that relief in full should be granted after denial of limitation.

The counsel for appellant have resorted to the record in the Santa Rosa case in which they state that an order was entered in the trial court exonerating and discharging the surety as affording a basis for the conclusion that the Santa Rosa case is authority that because of the denial of limitation of liability the litigation was at an end. As stated by counsel for appellant in his brief the Santa Rosa case was dismissed after denial of limitation of liability upon stipulation of the parties. It does not appear why an agreement to dismiss the proceeding was entered into. It is possible, if we may indulge in conjecture, after limitation of liability was denied, there was a settlement of the claims between the parties.

In The Pacific Mail Steamship Company case it appears that the decree of the trial court was reversed because the trial court had limited liability when the Circuit Court of Appeals deemed that liability should not be limited.

The Titanic case, which the appellant quotes from and relies upon as directly holding that the proceeding is at an end when limitation is denied not only does not hold as counsel for libelant contends, but is a leading authority to the effect that a limitation of liability proceeding confers upon the court in which it is filed full and complete jurisdiction of the entire controversy giving the court the right to grant or deny limitations of liability, and in either event to grant or deny judgments for claimants who have suffered damage in respect to the accident on account of which the proceeding is instituted. Not only does The Titanic hold this, but it intimates that a claimant is forever barred from urging a claim for damage in respect to the accident on account of which the proceeding is instituted, in any forum, where the notice provided for by statute has been properly given, except in the forum where the proceeding is instituted.

It is true Judge Hough in The Titanic used the language quoted by libelant in its brief, as follows:

> "The first of these litigations illustrates the view that the sole function of a limitation proceeding was to limit recovery in the event of a limitable liability being found. If the liability was not capable of limitation the proceeding was at an end. Both in the District Court and the Appellate Court this doctrine is not asserted but is assumed."

But he continues to say:

> "The assumption which underlies the actions of the courts in the Republic, supra, has been distinctly denied in the 9th Circuit by Pacific Mail Steamship Company, 130 Fed. 76 * * * and Oregon, etc. Co. vs. Portland Steamship Company, 162 Fed. 912. Whatever doubt may be left after reading these cases is I think set at rest by Dowdell vs. U. S. District Court, 139 Fed. 444, 71 C. C. A. 288, a case which is resolvable in the following statement, viz: that where the petitioner had taken the usual proceedings and limited the time within which claims might be conferred and was thereafter declared to possess no right of limitation **such petitioner was still protected by the original proceeding against any claim not filed within the time limited.**
>
> "It does not appear from any of these cases what would be the effect of an ultimate denial of limitation upon a party injured who had never come into the limitation proceeding, nor does it appear whether one who files a claim and successfully defeats limitation may thereafter abandon the proceedings as claimant and resort to other forums for the enforcement of his rights; but this much does clearly appear—that a ship owner may limit even one man's recovery by affirmative suit in the admiralty court, and that **when that jurisdiction is invoked the District Court may proceed to enforce against the petitioner what it considers to be full liability after denying limitation.**" (Black type ours.)

The syllabus of The Titanic is as follows:

> "The institution of a proceeding for limitation of liability vests the Admiralty Court with full and exclusive jurisdiction not only to determine the right of petitioner to the benefit of the statute but in case it denies such right to enforce the rights of damaged claimants in full * * *"

In Prov. & N. Y. S. S. Co. vs. Hale Mfg. Co., supra, this Court said:

> "The question to be settled by the statutory proceeding being first, whether the ship or its owners are liable at all, if that point is contested and has not been settled, and secondly, if liable, whether the owners are entitled to a limitation of liability, must necessarily be decided by the District Court having jurisdiction in the case, and to render its decision conclusive it must have entire control of the subject to the exclusion of other courts and jurisdictions."

In re Pacific Mail S. S. Company, 130 Fed. 75, the Circuit Court of Appeals reversed the judgment of the trial court and remanded the cause with directions to the trial court to enter **judgment against the petitioner denying its application for limitation of liability and in favor of the respective claimants for the full amount of damages it had theretofore awarded them, with interest and costs.**

In re Jeremiah Smith & Sons, 193 Fed. 397, the Circuit Court of Appeals reversed the trial court for allowing limitation of liability and remanded the cause with directions to enter a decree against the petitioner for the damages sustained by the claimant without any limitation.

In The Santa Rosa, 249 Fed. 160, the court denied limitation of liability and entered the following order:

> "The claimants may either pursue their remedies here or in the state courts as they may be advised. If

> they elect to remain here their claims will be referred to the commissioner. If they do not so elect any order restraining them from proceeding will be vacated."

That the record shows in The Santa Rosa case, as stated by appellant, that there was a stipulated dismissal of the proceeding and an exoneration of the surety merely indicates to our minds that the cause was either settled or that the claimants preferred to litigate their claims in the state courts.

Long before this question was settled in the lower courts by these decisions, Mr. Benedict, the well known admiralty authority (Benedict's Admiralty, 4th Edition, Sec. 527) foresaw it and expressed his view as to reasons which should impel the courts to retain jurisdiction for the purpose of giving full and complete relief, as follows:

> "It is a question yet to be determined whether the court on refusal to petitioner of exemption from liability, or of the right of limitation of his liability, may in the same proceeding enter judgment against him for the full amount of the claims proved against him before the commissioner, and yet, if this cannot be done the result might be a practical denial of justice to the damaged claimants, for a petitioner may file his libel claiming exemption and limitation under the statute and litigate his right to such limitation for years, meantime enjoining all proceedings against him, if at the end of that period his right to exemption and to limitation is denied, and the court notwithstanding, has power only to dismiss the petition, it might well be that the lapse of time with its necessary loss or dispersal of witnesses, would prevent the claimants from again proving in other forums claims which were good and entirely capable of proof at the time when they were enjoined by the limitation proceeding or which were actually proven in the limitation proceeding, but could not be again proved in another court. It seems but common equity, therefore, that a petitioner, choos-

ing within certain limits his own forum, enjoins all other suits or actions, brings such claims into his own proceeding and submits his right to the court, that that court if it refuses his prayer for the exemption of limitation of liability, shall have the power to go further and decree affirmatively against him the full amount of the damages which have been proved against him in his own proceeding before the commissioner who he himself has asked to have appointed to receive those very claims."

Nor does it seem by the same reasoning that the court, continuing to have jurisdiction over the proceeding for the purpose of doing justice by the claimants should lose control of the res, that is, the vessel and its pending freight, which has been placed in court by the petitioner in order to secure the proceeding.

It seems to follow logically from the language of The Tolchester, 42 Fed. 180, that the court does not lose control over the fund so long as it retains jurisdiction of the subject matter of the proceeding, and that it retains the fund for the purpose of making application of it to whatever decree it may have jurisdiction to enter. It is here said: "But after the stipulation was filed there was placed under the court's control a fund for distribution and in which all parties interested, are entitled to share, that could not be withdrawn without the consent of all interested, and whether or not the court is entitled to retain that fund and to exercise the jurisdiction involved must be determined by the facts existing at the time it was placed in the court's control.

A thoughtful consideration and analysis of the character of the action as defined by numerous decisions of our appella'e courts and this Court lead to the conclusion that it is an action in the nature of a creditor's bill for the purpose of securing a concourse of the creditors on account of a particular accident in which the vessel and her pend-

ing freight are impounded for the purpose of being surrendered to such creditors in the event they establish claims against the owner of the impounded fund. The owner of the fund makes the issues to be litigated in the action by his petition and consequently defines the measure of possible recovery against the fund and against himself. It would seem that the right against the fund should be held to be co-extensive with the limits of possible recovery fixed by the petition.

Illuminative cases discussing the nature of the proceeding are:

The Garden City, 26 F. 766, 771.

Dowdell vs. U. S., Dist. Crt. 139 F. 445.

Providence & N. Y. S. S. Co. vs. Hill Mfg. Co., 109 U. S. 578, 595, 27 L. Ed. 1038.

Black vs. S. P. R. Co., 39 Fed. 565.

Oregon R. R. & Nav. Co. vs. Balfour, 90 F. 295.

Butler vs. Boston S. S. Co., 130 U. S. 527, 32 L. Ed. 1017.

A literal construction and application of the rules of procedure of this Court in a limitation proceeding leads to the conclusion that control of the fund is not lost by denial of limitation of liability, but that upon the return of the report of the commissioner and approval of the same the fund must be distributed whether limitation is denied or granted, where claims have been established by claimants-respondents in the proceeding.

Rule 51 provides in substance that upon the filing of the proper petition with a surrender of the vessel or her value, or with a stipulation for the appraised value of the same, notice to claimants to file their respective claims shall be given and the court shall enter an injunction against the prosecution of such claims in any other proceeding than the limitation proceeding.

Rule 52 then provides that proof of all claims filed in

pursuance of the order of court and the notice shall thereafter be made before a commissioner, and that upon the completion of said proofs before the commissioner the commissioner shall make a report of his findings, which shall be either confirmed or rejected by the court after hearing exceptions, and that on such finding by the court approving the commissioner's report "the monies paid or secured to be paid into court, as aforesaid, or the proceeds of said ship or vessel and freight (after payments of costs and expense) shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims duly approved and confirmed, as aforesaid."

Rule 53 then gives the owners of the fund liberty to contest their personal liability or the liability of the ship or vessel, for the damage in question, independently of the limitation of liability claimed under the Act, "provided he, or it or they shall have complied with the requirements of Rule 51, etc.," and then provides that any person or persons claiming damages, as aforesaid, may file claim and answer and contest the right of the owner or owners of the fund either to an exemption from liability or to a limitation of liability, or to both, provided their claims and answers state the grounds upon which liability is claimed or the right to limitation should be denied, but nowhere do these rules provide for or contemplate a return of the fund to the petitioner in the event limitation is denied.

Benedict, in his work, in discussing the procedure in a limitation case, treats it as a matter of course that upon the return of the commissioner's report finding in favor of claimants on their claims, whether limitation is denied or granted, a distribution pro rata shall be made by the court. See Benedict's Admiralty, 4th Edition, Secs. 553, 555, 556.

The theory upon which the appellant seems to make the

contention that the court loses control of the fund upon denial of limitation is that the petitioner in surrendering the fund to the court does so merely for the purpose of obtaining limitation of liability. A careful consideration of the authorities and of the rules of this Court convinces us that this argument is not tenable, because it would seem that under the Supreme Court rules the fund is tendered in court as a prerequisite to the right of the petitioner, both to seek limitation of liability and to secure total exemption from liability in a case where the petitioner desires to avail himself of both remedies, as well as to secure the injunction restraining the injured parties from proceeding against any property of the petitioner, which they might otherwise do by execution, garnishment, or other like process, other than the property constituting the limitation fund.

The conception of this Court that the fund should be a fund for all of the purposes of the proceeding to be applied in any event except upon the granting of total exemption, upon the established claims, is indicated by the inclusion in Rule 53 of the words "provided he, it or they shall have complied with the requirements of Rule 51, etc."

But whether or not the fund be held to have been technically placed in the possession of the court as a security for the claims irrespective of whether limitation is denied or not, still the courts, having possession and control of the funds, has the authority to apply them in satisfaction of its judgments.

If it were in possession of the owner it would be subject to a levy of execution to satisfy the judgment tendered herein, and by all modern authority this court will not be compelled to resort to the cumbersome legal process in the nature of a writ of execution in order to apply it in satisfaction of its judgment, but it may issue its decree direct ordering the clerk of the court to pay over the fund pro

rata to those in favor of whom the judgments have been entered. See Turner vs. Fendall, 1 Cranch. 117, 2 L. Ed. 53; Hampton vs. Ward, 4 Texas Rep. 355; Dolby vs. Mullins, (Tenn.), 3 Humph. 437; Langdon vs. Lockett, 6 Ala. 727, 41 Am. Dec. 78; King vs. Moore, 6 Ala. 160, 41 Am. Dec. 14.

In the case of Turner vs. Fendall, supra, this Court, speaking through Chief Justice Marshall, in determining the question of whether or not a sheriff having money in his possession made on execution may apply it in satisfaction of another execution in his hands against the party in whose favor the first execution was issued, held that the creditor in the first execution had not "Such a legal property in the specific pieces of money levied for him and in the hands of the sheriff as to authorize that officer to take those pieces in execution, as the goods and chattels of such creditor." But this Court further said "But the money becomes liable to such execution the instant it shall be paid into the hands of the creditor; and it then becomes the duty of the officer to seize it. It appears unreasonable that the law should direct a payment under such circumstances. If the money shall be seized the instant of its being received by the creditor, then the payment to him seems a vain and useless ceremony which might well be dispensed with; and if the money should, by being so paid, be withdrawn from the power of the officer, then his own act would put beyond his reach, property rendered by law liable to his execution, and which, of consequence, the law made it his duty to seize. The absurdity involved in such a construction led the Court to a further consideration of the subject." And this Court held that, having the second execution in his hands, it was the duty of the officer to have returned the money into the Court, in which event upon equitable principles, the money could and should have been directed by the Court to be paid to the person in whose behalf the second execution was issued.

On this theory the highly technical contention urged by the appellant that even though the liability of the petitioner is established no liability is established against his property in court, seems to be answered by the expression of this Court in The City of Norwich, supra, as follows:

> "To say that an owner is not liable but that his vessel is liable seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability a man and his property cannot be separated unless where, for public reasons the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc. His property is what those who deal with him rely on for the fulfillment of his obligations. Personal arrest and restraint when resorted to are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a ship bound in bottomery or subject to seizure for contraband cargo or illegal trade; and it may even be called 'the guilty thing,' but the liability of the thing is so exactly the owner's liability that a discharge or pardon extended to him will operate as a release of his property, etc."

And by the same logic it would seem that when a man is found obliged to pay a claim his property will be subject to the same obligation, and when in the possession and control of the court which gives a judgment against him it would be a monstrous absurdity as intimated by Mr. Justice Marshall for the Court to order it delivered back to him and thus place it beyond reach of execution.

Another reason urged by the appellants why the fund should be discharged is that there is no lien against the freight money. We submit that this is no reason why the fund should not be held for the obligations of its owner.

Besides, if the fund was voluntarily surrendered to the court for the purposes of all the issues made by the petition, and the claims, and for the satisfaction of the decrees entered thereon, it can make no difference that there is no maritime lien against the freight. If the purpose of the action was to impound only that property against which there exists maritime liens, there is no reason in the world why it was required that the pending freight against which no liens can exist should be surrendered.

The action for limitation of liability and the proceeding whereby the rights of the parties are adjusted is in reality an equitable action in rem and in personam, an equitable action to the extent that the admiralty court having the broadest of powers to do exact justice between the parties may take any such action in the case as is necessary to rightly and justly deal with the parties, an action in rem insofar as the judgments reach the fund placed in court by the petitioner, and in personam insofar as the personal liability of the petitioner is established or found not to exist. See Benedict's Admiralty, 4th Edition, Sec. 519, and Morrison vs. U. S. District Court, supra, where it is said:

> "The proceeding to limit liability is not an action against the vessel and her freight except when they are surrendered to a trustee, but is an equitable action."

See also Dowdell et al vs. U. S. District Court, 139 Fed. 445, where the court says:

> "And in proceedings of this character which have been designated as 'equity proceedings in admiralty,' to prevent a multiplicity of suits, it has frequently been decided that the powers of an admiralty court are as extensive, and its remedies are as effective, as are those of a court of chancery when its jurisdiction is invoked in an equitable proceeding."

Other apt cases are:

Re Pacific Mail S. S. Co. 130 Fed. 76.
The Annie Faxon, 75 Fed. 312, 320.

It was no doubt upon the equitable considerations set forth by Mr. Benedict in his work quoted herein that the lower courts were finally moved to decide that in a limitation proceeding the court has jurisdiction where it denies limitation of liability to enter a decree for full liability, in order to prevent the great injustice which might be worked upon litigants by the prolonged litigation of a limitation proceeding during which the damaged claimants could not otherwise proceed to protect their claims, and it would seem from a careful consideration of the matter that these same considerations should to a far greater extent impel the courts to go one step further and decide that the fund placed in court by the petitioner is subject to be applied in satisfaction of the costs of court and the decrees for full liability.

No greater example of injustice or hardship can be imagined than the instant case. Here the damage occurred in December, 1920. At that time the record in the case below shows that the petitioner was possessed of a number of vessels engaged in the oil transport business, and the probabilities are that it possessed assets of various kinds which could have been reached by the process of some of the state or federal courts, but the petitioner filed a petition for limitation of liability, and after surrendering to the court the vessel and its pending freight obtained an injunction which prevented this appellee and other claimants who had suffered damage by reason of the explosion of the BOLIKOW from seeking the remedial writs of either the state or federal courts, such as a writ of attachment, writ or garnishment or other writs, which they might have availed of at that time. And now, at the expiration of

five years, during which time appellee and the other claimants have had their hands completely tied, the petitioner has become bankrupt and without property or funds upon which this appellee's judgment of approximately $300,000.00 may be realized, and all that is left for the satisfaction of costs of court and the expense incurred by this appellee in this litigation is the fund which the petitioner voluntarily surrendered to the court at the time it filed its petition.

We submit with the broad equity powers which the Admiralty court possesses that it should hold that the vessel and pending freight which is now in the constructive possession of the court should be applied, first in payment of the costs of the litigation, and second, that the remainder should be distributed among those who have judgments, pro rata, according to the amount of their judgments, and that the lower court had the power to make such disposition of it, and therefore had the right to direct its return into court as it did.

We come now to a consideration of the only case that we know of where this question has been squarely before any court.

In the case of The Virginia, 266 Fed. 437, the question was squarely before Judge Rose, but not exactly in the same way as it is here. The Virginia caught fire in Chesapeake Bay and was largely destroyed by fire. The owners of the Virginia sought limitation of liability. The main case was reported in 264 Fed. 986. There were two kinds of claimants who filed claims in the limitation proceedings and asked for affirmative judgments, viz., cargo damage claimants and passenger damage claimants. The court limited liability as to the claims of the cargo owners, but

denied limitation as against the passengers' claims. Having denied limitation as to the passengers' claims, the petitioner contended that the pro rata of the appraised value of the vessel which would have gone to the passengers' claims had limitation been allowed as against them, was discharged by the denial of limitation as to those claims, exactly the contention that is made here with respect to the whole of the fund. Judge Rose denied their contention, and in the exercise of those equity powers which a court of admiralty possesses, held that since the concern was a solvent concern and the passengers could obtain satisfaction of their claims by proceeding against other property of the petitioners, while the cargo owners' recoveries were limited to the fund, the whole fund would be paid to the cargo owners in satisfaction of their claims, and the passenger claimants would be left to their remedies against other property of the petitioner, but Judge Rose said:

> "No reported case dealing with this precise point has been brought to my attention. **If the petitioners were insolvent the passengers would be doubtless entitled to share in the proceeds of the res, but that would be their right, and not the ship owners.**" (Black letters ours.)

To hold, as the petitioner contends this Court should hold, would in our opinion lead to a far greater absurdity than that involved in the payment of money in the hands of the sheriff to a person against whom the sheriff holds an execution, as Mr. Justice Marshall points out in Turner vs. Fendall. If the petitioner is right we then place the Court in the position of granting a full recovery to the injured parties, and by so doing effectively depriving them of any recovery at all, when by depriving them of the full recovery they were entitled to, and granting the petitioner for limitation of liability, a limitation of liability they were not entitled to, the trial Court would have made it possible

for the injured parties to recoup, in a small measure, their losses.

The appellant, surety company, has no rights in the matter that the owner of the vessel would not have. In bailing the property out the surety was charged with the duty of providing for its return to the court for such disposition of it as the court might legally make. If it did not it should have secured itself against the possible failure of its principal to make return of the bailed property.

LAST POINT.

The judgment of the court below was right and should be affirmed, with interest and costs.

Respectfully submitted,

BURLINGHAM, VEEDER, MASTER & FEARY,
of New York.

TERRY, CAVIN & MILLS,
W. T. ARMSTRONG,
W. E. CRANFORD,
of Galveston,

Proctors for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 45.—October Term, 1926.

Hartford Accident & Indemnity Company of Hartford, Petitioner, *vs.* Southern Pacific Company et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 21, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The National Oil Transport Company, the owner of wooden oil tank barge *Bolikow*, filed a libel in the United States District Court for the Southern District of Texas against the Southern Pacific Company, alleging that the *Bolikow*, made fast to a dock in the harbor of the city of Galveston, was laden with a cargo of crude oil from which a large part had been discharged; that an explosion took place in one of her tanks, causing fire; that the *El Occidente*, a steamer of the Southern Pacific Company, was injured by the fire; that the value of the barge after the explosion and fire was $250 and her pending freight at the time did not exceed $11,076.85; that the damage to the *Occidente* was due not to the *Bolikow* but to her own negligent management and the lack of power of the tug which attemptel to take her to a safe place; that the claims of the owners of the *Occidente* were in excess of $484,000, and there were claims by persons on the barge for death and injuries from the fire, amounting to $50,000 in one case, and $15,000 in another. The owner contested his liability and that of its barge *Bolikow* to any extent whatever, but in case its liability was established, claimed and sought the benefit of the statutory limitation of its liability. R. S. 4283, 4284 and 4285.

Pursuant to the court's order, the National Oil Transport Company as principal and the Hartford Accident & Indemnity Company, as surety, executed an *ad interim* stipulation that the former as principal and the latter as surety undertook in the sum of $11,326.85, with interest, that the Transport Company would file a bond or stipulation for the limitation of its liability as owner

of the barge *Bolikow*, executed in due form of law for the value of the Transport Company's interest in the barge, and her pending freight with six per cent. interest thereon from December 23, 1920, within ten days after such values were determined by appropriate proceedings in the court, and an order fixing such value was entered therein and that pending the filing of the formal stipulation, the *ad interim* undertaking should stand as security for all claims in the proceeding.

The court then made an order directing the issuing of a monition to claimants against the vessel and her owner growing out of the explosion, and an injunction. Without further action as to fixing the value of the barge or its pending freight, the claimants came in, the cause proceeded to a final decree, after a report by a commissioner, the petition for limitation of liability was denied, the claims in whole or in part were allowed, and the decree proceeded:

"And it further appearing to the Court that neither the petitioner nor its stipulator nor any other party or interest has moved for or caused any re-appraisal or appraisal of the petitioner's interest in said barge and her pending freight, or either of them or caused any order to be entered by the Court fixing such value except as was done by the approval and filing of said *ad interim* stipulation as aforesaid and the issuance and publication of a monition thereon as aforesaid, and it further appearing to the Court that no bond for value other than said *ad interim* stipulation has been filed herein by the petitioner and it appearing from the evidence introduced on the trial hereof and the Court here and now finding that the value of the petitioner's interest in said barge at the termination of her voyage is $250, and that the value of the petitioner's interest in the pending freight of said barge at the termination of said voyage is $11,076.85, and that the total value of said petitioner's interest in said barge and her pending freight at the termination of her said voyage is $11,326.85; it is therefore ordered and decreed that unless this decree be satisfied or an appeal be taken therefrom within the time limited by law and the rules and practice of this Court, the stipulator for value will cause the said petitioner to pay into Court the sum of $11,326.85, the amount of the value of the petitioner's interest in the said barge and pending freight at the termination of her said voyage, with 6 per cent interest from December 23, 1920, to be applied in payment of the costs of Court, the remainder to be pro rated among the respective claimant-respondents in proportion to the amounts of the decrees entered in their favor herein, or show cause why execution should not issue therefor, against goods, chattels and lands of the stipulator for value."

The Hartford Indemnity Company, the stipulator, appealed from this decree which the Circuit Court of Appeals of the Fifth Circuit affirmed. 3rd Fed. (2nd series) 923. We brought the case here by certiorari. 267 U. S. 590.

The contention of the petitioner is that it could become liable only in the event limitation of liability was granted, and as that relief was denied, the stipulation ceased to be effective; that upon a denial of a limitation of liability there ceased to be a *res* in court, that the proceeding was no longer one *in rem* and that suits for the claims against the ship owner must be conducted in a court having jurisdiction on other grounds.

It is surprising that no case has ever arisen in which the question here mooted has been directly decided, though the effect of a decision refusing limitation has been the subject of discussion in *The Titanic*, 204 Fed. 295 and in *The Virginia*, 266 Fed. 437, 439. See also *Dowdell* v. *U. S. District Court*, 139 Fed. 444; *In re Jeremiah Smith & Sons*, 193 Fed. 395; *The Santa Rosa*, 249 Fed. 160.

The history and proper construction of the Limitation of Liability Act of 1851, 9 Stat. 635, now embodied in Revised Statutes, sections 4282 to 4287, are shown in a series of cases in this Court, the chief of which is the *Norwich Company* v. *Wright*, 13 Wall. 104. Further consideration to this subject was given by the Court in *The Benefactor*, 103 U. S. 239; in the *Providence & New York Steamship Company* v. *Hill Manufacturing Company*, 109 U. S. 578; in the *City of Norwich*, 118 U. S. 468, 503; in *The Scotland*, 118 U. S. 507; in *Butler* v. *Boston & Savannah Steamship Company*, 130 U. S. 527; and *In re Morrison*, 147 U. S. 14, 34; in *The Albert Dumois*, 167 U. S. 240; in *The Hamilton*, 207 U. S. 398, and in the *La Bourgogne*, 210 U. S. 95.

These decisions establish, first, that the great object of the statute was to encourage shipbuilding and to induce the investment of money in this branch of industry by limiting the venture of those who build the ships to the loss of the ship itself or her freight then pending, in cases of damage or wrong happening, without the privity or knowledge of the ship owner, and by the fault or neglect of the master or other persons on board; that the origin of this proceeding for limitation of liability is to be found in the general maritime law differing from the English maritime law; and that such a proceeding is entirely within the constitu-

tional grant of power to Congress to establish courts of admiralty and maritime jurisdiction, *Norwich* v. *Wright*, 13 Wall. 104, that to effect the purpose of the statute, Admiralty Rules Nos 54, 55, 56 and 57 were adopted by which the owner may institute a proceeding in a United States District Court in admiralty against one claiming damages for the loss in which he may deny any liability for himself or his vessel, but may ask that if the vessel is found at fault his liability as owner shall be limited to the value of the vessel as appraised after the occurrence of the loss and the pending freight for the voyage; that these damages shall include damages to goods on board, second, damages by collision to other vessels and their cargoes, and, third, any other damage or forfeiture done or incurred; that all others having similar claims against the vessel and the owner may be brought into concourse in the proceeding by monition and enjoined from suing the owner and vessel on such claims in any other court, that the proceeding is equitable in its nature and is to be likened to a bill to enjoin multiplicity of suits, *Providence Steamship Co.* v. *Hill Manufacturing Company*, 109 U. S. 578, that by stipulation after appraisement the vessel and freight may be released, and the stipulation be substituted therefor, that on reference to a commissioner and the coming in of his report, it shall be determined, first, whether the owner and his vessel are liable at all; second, whether the owner may avoid all liability except that of the vessel and pending freight; third, what the amount of the just claims are, and, fourth, how the fund in court should be divided between the claimants. The cases show that the court may enter judgment *in personam* against the owner as well as judgment *in rem* against the *res* or the substituted fund (*City of Norwich*, 118 U. S. 468, 503), that the fund is to be distributed to all established claims to share in the fund to which admiralty does not deny existence, whether they be liens in admiralty or not (*The Hamilton*, 207 U. S. 398, 406), and that they may include damages from a collision, from personal injuries (*Butler* v. *Boston Steamship Co.*, 130 U. S. 527) or for wrongful death if arising under a law of Congress, a State of the Union or a foreign state, which is applicable to the owner and the vessel. *The Bourgogne*, 210 U. S. 95, 138.

It is quite evident from these cases that this Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court. *Dowdell* v. *United States District Judge*, 139 Fed. 444, 445. The proceeding partakes in a way of the features of a bill to enjoin the multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. It looks to a complete and just disposition of a many cornered controversy and is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person. *The City of Norwich*, 118 U. S. 468, 503.

With this general view of the statute, we come to the contention of the petitioner in this case. He says that the owner only brings the suit to limit his liability, if it exists, to the vessel and the freight for the voyage. If he fails in his purpose and does not establish the limitation, no progress can be made in behalf of the defendant or the claimants in the collection of what has been found due them, and because he has lost that feature of his suit against them the case must be dismissed. This is said to follow, even though it is apparent that by virtue of the owner's suit and the injunction he secured he has delayed and prevented his creditors from resorting to any other forum to vindicate their rights against him. In this view the defendant and the claimants thus may not thereafter share in the fund or *res*, the deposit of which for the benefit of the defendants and the claimants was the principal ground and the indispensable condition of the proceeding. The parties, it is argued, must thereafter be remitted to a common law or equity court of the state to secure their rights, unless diverse citizenship or the admiralty character of their claims entitles them to resort to, or remain in, a Federal Court.

Surely the admiralty court, in view of the large powers intended to be given it in such a proceeding, is not so helpless as this. So to hold would be to hold that unless the petitioner wins, the court does not have power to administer justice. There is nothing in

the statute nor in the rules that requires so feeble a conclusion. The jurisdiction of the admiralty court attaches *in rem* and *in personam* by reason of the custody of the *res* put by the petitioner into its hands. The court of admiralty in working out its jurisdiction acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the *res* and by judgment *in personam* against the owners so far as the court may decree. It would be most inequitable if parties and claimants brought in against their will and prevented from establishing their claims in other courts should be unable to perfect a remedy in this proceeding promptly and should be delayed, until after the possible insolvency of the petitioner, to seek a complete remedy in another court, solely because the owner can not make his case of personal immunity. Benedict's Admiralty, 1 Vol. 488, 5th ed. If Congress has constitutional power to gather into the admiralty court all claimants against the vessel and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the *res* and by judgments *in personam* for deficiencies against the owner if not released by virtue of the statute.

Such a conclusion is quite in accord with the rules governing equity procedure in general conformity with which this limitation of liability statute has been construed and enforced. Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide the whole issues and award complete relief even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law. Pomeroy's Equity Jurisdiction (4th ed.), Vol. 1, sections 181 and 231. *United States* v. *Union Pacific Railway Company*, 160 U. S. 1, 52. See also Equity Rule 10, amended May 4, 1925, 268 U. S. 709, Appendix. Of course this equitable rule enlarging the Chancellor's jurisdiction, in order completely to dispose of the cause before him, does not usually apply in an admiralty suit. *Grant* v. *Poillon*, 20 How. 162; *Turner* v. *Beacham*, Taney's Reports 583, Federal Cases No. 14252; *The Pennsylvania*, 154 Fed. 9; *The Ada*, 250 Fed. 194. But this limitation of liability proceeding differs from the ordinary ad-

miralty suit, in that by reason of the statute and rules, the court of admiralty has power (*Providence Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578) to do what is exceptional in a court of admiralty—to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court (Benedict on Admiralty (5th ed.), sec. 70, note 97). There necessarily inheres therefore in the character of the limitation of liability proceeding in reference to such non-admiralty claims, the jurisdiction to fulfil the obligation to do equitable justice to such claimants by furnishing them a complete remedy.

The Indemnity Company seeks in this review to avoid its liability under an *ad interim* stipulation having a provision that such stipulation if not changed to a formal stipulation shall stand as security for all claims in the limitation proceeding. The stipulation is a substitute for the vessel itself and the freight which was released by reason thereof. The effect of such a stipulation in admiralty is set forth by Mr. Justice Story in *The Palmyra*, 12 Wheat. 10, where he says:

"Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court, which it could properly exercise if the thing itself were still in its custody. This is the known course in admiralty. It is quite a different question whether the court will, in particular cases, exercise its authority where sureties on the stipulation may be affected injuriously; that is a question addressed to its sound discretion."

In *The Oregon*, 158 U. S. 186, 209, after reference to *The Palmyra* and an examination of the English authorities, it was held that the use of bail as a substitute for the property itself is confined to "all points fairly in adjudication before the Court." In that case a stipulator for the release of a vessel libeled for a collision was held not to be responsible to intervenors in the suit intervening after the release of the vessel in the absence of express agreement to that effect. In reversing the court below, this Court said, through Mr. Justice Brown:

"We think the court must have confounded a stipulation given to answer a particular libel with a stipulation for the appraised

value of the vessel, under the limited liability act, which, by general admiralty rule 54, is given for payment of such value into court whenever the same shall be ordered, and in such case the court issues a monition against all persons claiming damages against the vessel, to appear and make due proof of their respective claims. And by rule 55, after such claims are proven and reported, 'the moneys paid, or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight shall be divided pro rata amongst the several claimants, in proportion to the amount of their respective claims.' By rule 57, if the ship has been already libelled and sold, the proceeds shall represent the same for the purpose of these rules. In all cases cited, in which it has been said that the stipulation is a substitute for the thing itself, the remark has been made either with reference to the particular suit in which the stipulation is given, or with reference to a stipulation for the appraised value of the vessel, where the stipulation stands as security for any claim which may be filed against her up to the amount of the stipulation."

It is quite evident from this that the stipulation under Rule 54, *et seq.*, is to be treated as a substitute for the vessel itself for all claims that may normally arise out of the character of litigation carried on under such rules. That litigation as we have seen may properly be carried to a complete settlement of all claims, without regard to whether the prayer for limitation of liability is denied or not. The stipulator must, therefore, pay in full on his undertaking to enable the court to pay the costs and make the pro rata distribution.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.